The Respondent also contends that the Board's decisions stand for the proposition that employees have the right to have certification decisions heard on their merits. The Board has made no such holding or suggestion. If, by way of the example cited in the Respondent's brief, the class representative misses a filing deadline, nothing in any of the Board's cases suggests a court must nonetheless decide class certification on the merits.

As to the Respondent's assertion that there is no basis in the NLRA, the Federal Rules, or case law for *D .R. Horton's* presumption that class procedures were created to serve any concerns or purposes under the NLRA, the Board has not relied on such concerns or purposes. Two employees who together file charges with the Equal Employment Opportunity Commission (EEOC) about racial harassment are engaged in concerted activity about their working conditions, though the EEOC's charge processing procedures were certainly not created to serve any concerns or purposes under the NLRA. The EEOC's procedures, like class procedures in court, are one of many avenues available for concerted legal activity, regardless of the purposes those procedures were intended to serve.

The Respondent next appears to be arguing that employees can, albeit in vain, file putative class action lawsuits despite the MAA, suffer no adverse consequences for it, and therefore the MAA does not infringe on their rights. There need not be adverse consequences for non-adherence to the MAA for it to violate the Act. Moreover, the MAA on its face spells out adverse consequences for filing putative class actions. The MAA states, in relevant part:

> Should any party institute any action in a court of law or equity against the other party with respect to any Dispute required to be arbitrated under this Agreement, the responding party shall be entitled to recover from the initiating party all costs, expenses, and attorney fees incurred to enforce this Agreement and compel arbitration, and all other damages resulting from or incurred as a result of such court action.

Thus, in addition to breaking an agreement with the employer not to sue as an express condition of continued employment, an employee who files a putative class action may be assessed with fees and damages.

The Respondent also contends that the Board in *D. R. Horton* misinterpreted the *Norris-LaGuardia Act* (NGLA) when determining it prohibits the enforcement of agreements like the FAA. The Board recently reaffirmed its position that the FAA must yield to the NLGA, stating

> The Board has previously explained why "even if there were a direct conflict between the NLRA and the FAA, the Norris-LaGuardia Act . . . indicates that the FAA would have to yield insofar as necessary to accommodate Section 7 rights." An arbitration agreement between an individual employee and an employer that completely precludes the employee from engaging in concerted legal activity clearly conflicts with the express federal policy declared in the Norris-LaGuardia Act. That conflict in no way depends on whether the agreement is properly characterized as a condition of employment. By its plain terms, the Norris-LaGuardia Act sweepingly condemns "*[a]ny* undertaking or promise . . . in conflict with the public policy declared" in the statute: insuring that the "individual unorganized worker" is "free from the interference, restraint, or coercion of employers . . . in . . . concerted activities for the purpose of . . . mutual aid or protection," including "[b]y all lawful means aiding any person participating or interested in any labor dispute who . . . is prosecuting, any action or suit in any court of the United States or any state."

On Assignment Staffing Services, supra, slip op. at 10 (Emphasis in original, internal citations and footnotes omitted.)

2. The MAA as an employment contract

The Charging Party also asserts that the FAA does not apply because there is no employment contract, citing to the Supreme Court's decisions in *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 113–114 (2001), *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006), and *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 277 (1995).[7] The Charging Party points out that the MAA itself states, "[t]his Agreement is not, and shall not be construed to create, a contract of employment, express or implied, and shall not alter Employee's at-will employment status." The employees' at-will status is also set forth in the introductory paragraph of the employee handbook. (Jt. Exh. I p. 5; Jt. Exh. J p. 5.)

The Charging Party notes that the Respondent has not offered evidence or argument that a contract of employment has been created by virtue of the MAA in any of the states where it operates. Resolution of this issue would involve delving into each state's body of contract law.[8] Because it is not required to support my conclusion herein that the MAA violates Section 8(a)(1), I decline to undertake this enormous task, the legal aspects of which none of the parties have addressed in their briefs.

[7] The Charging Party also asserts that MAA, when coupled with the Respondent's confidentiality policy, solicitation policy, loitering policy, email usage policy, computer usage policy, and/or return of company property policy, provide other bases for finding it unlawful. I agree that these policies, when viewed in conjunction with the MAA, act as further barriers to employees discussing their arbitrations under the MAA and/or garnering support from fellow employees. The complaint, however, does not allege that any policy other than the MAA violates the Act, and therefore my conclusions are limited to the MAA. See *Penntech Papers*, 263 NLRB 264, 265 (1982); *Kimtruss Corp*., 305 NLRB 710, 711 (1991).

The Charging Party sets forth numerous other arguments, including the FAA's impact on other federal and state statutes, the rights of workers to organize under the Religious Freedom Restoration Act (RFRA), and the effect of the MAA on union representation. I have considered each argument in the Charging Party's brief. Because this case can be decided by applying the Board precedent discussed above, I do not address all of the Charging Party's arguments.

[8] For example, under Minnesota law, the disclaimer language in the MAA may negate the existence of a contract. See *Kulkay v. Allied Central Stores, Inc*., 398 N.W.2d 573, 578 (Minn.Ct.App.1986). By contrast, in *Circuit City*, the Court of Appeals for the Ninth Circuit determined the dispute resolution agreement at issue, with disclaimer language almost identical to the agreement at issue here, was an "employment contract." *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (1999); See also *Ashbey v. Archstone Property Management, Inc*., 2015 WL 2193178 (9th Cir. 2015).

3. The MAAs and commerce

The Charging Party argues that there is no evidence the individual MAAs with the Respondent's employees affect commerce, and asserts that the activity of arbitration does not affect interstate commerce. This raises the fundamental question of what, in fact, is the "transaction involving commerce" the MAA evidences to bring it within the FAA's reach?

The FAA, at 9 USC § 2, applies to a "written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . ." Specifically excluded, however, are "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 USC § 1. The Supreme Court in *Circuit City* interpreted this exclusionary provision, "any other class of workers engaged in foreign or interstate commerce," narrowly, and held it applied only to workers actually working in commercial industries similar to seamen and railroad employees. Relying on *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995),[9] the Court in *Circuit City* interpreted Section 2's inclusion provision, a "contract evidencing a transaction involving commerce," broadly, finding it was not limited to transactions similar to maritime transactions.[10] In line with these interpretations, most contracts of employment fall within the FAA's reach, regardless of whether the employees themselves are involved in any traditionally-defined commercial transactions as part of their work.

In *Allied-Bruce Terminix*, supra, the Supreme Court examined the phrase "evidencing a transaction" involving commerce and determined that "the transaction (that the contract 'evidences') must turn out, *in fact* . . . [to] have involved interstate commerce[.]" (emphasis in original). A prior Supreme Court case, *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), that like *Circuit City* and *Allied-Bruce Terminix* interpreted the words "involving commerce" as broadly as the words "affecting commerce,"[11] involved an employment contract between Polygraphic Co., an employer engaged in interstate commerce, and Norman Bernhardt, the superintendent of Polygraphic Co.'s Vermont plant. The employment contract at issue contained a provision that in case of any dispute, the parties would submit the matter to arbitration by the American Arbitration Association.

The Supreme Court found the FAA did not apply because the company did not show that the employee, "while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions."[12]

[9] The Court in *Allied-Bruce* found that the term "involving" was the same as "affecting" and that the phrase "'affecting commerce' normally signals Congress' intent to exercise its Commerce Clause powers to the full." 513 U.S. at 273–275.

[10] Though I am bound by the majority's decision in *Circuit City*, I find the dissenting opinions, and in particular Justice Souter's explanation of why the Court's "parsimonious construction of § 1 of the . . . FAA . . . is not consistent with its expansive reading of § 2," more sound and compelling. Presumably the result of adherence to precedent, the phrase "contract evidencing a transaction involving commerce" is not seen as a residual phrase following the specific category of maritime transactions in § 2, but the phrase "any other class of workers engaged in foreign or interstate commerce" is seen as a residual phrase following the specific categories of seamen and railroad employees in § 1. This distinction supplied the Court's rationale for applying the maxim *ejusdem generis* to "any other class of workers engaged in foreign or interstate commerce" to support its finding that employment contracts are covered by the FAA. "Maritime transactions" is defined in § 1 by way of listing various transactional contracts, such as charter parties, bills of lading, and agreements relating to supplies and vessels. Applying *ejusdem generis*, the expansive definition given to the phrase "contract evidencing a transaction involving commerce," fails to give independent meaning to the term "maritime transaction."

[11] *Allied-Bruce Terminix*, supra, at 277.

[12] The agreement provided for the employment of Bernhardt as the superintendent of Polygraphic Co.'s lithograph plant in Vermont. Its terms stated:

"Subject to the general supervision and pursuant to the orders, advice and direction of the Employer, Employee shall have charge of and be responsible for the operation of said lithographic plant in North Bennington, shall perform such other duties as are customarily performed by one holding such position in other, same or similar businesses or enterprises as that engaged in by the Employer, and shall also additionally render such other and unrelated services and duties as may be assigned to him from time to time by Employer.

"Employer shall pay Employee and Employee agrees to accept from Employer, in full payment for Employee's services hereunder, compensation at the rate of $15,000.00 per annum, payable twice a month on the 15th and 1st days of each month during which this agreement shall be in force; the compensation for the period commencing August 1, 1952 through August 15, 1952 shall be payable on August 15, 1952. In addition to the foregoing, Employer agrees that it will reimburse Employee for any and all necessary, customary and usual expenses incurred by him while traveling for and on behalf of the Employer pursuant to Employer's directions.

"It is expressly understood and agreed that Employee shall not be entitled to any additional compensation by reason of any service which he may perform as a member of any managing committee of Employer, or in the event that he shall at any time be elected an officer or director of Employer.

"The parties hereto do agree that any differences, claim or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them to arbitration by the American Arbitration Association, or its successor and that the determination of said American Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or it its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations [section 1448 et seq.]. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere.

"The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance with and under and pursuant to the laws of the State of New York and that in any action special proceedings or other proceeding that may be brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be applicable and shall govern to the exclusion of the law of any other forum, without

Here, the contract at issue is the MAA.[13] There is no other employment contract implicated in the complaint or the answer.[14] By virtue of the MAA, the employee and employer have transacted an agreement to resolve employment disputes through arbitration. What is analytically more difficult about the MAA and similar agreements, when compared with most contracts, is that the arbitration agreement itself is part of the consideration for the transaction. The agreement here states that the "Mutual Arbitration Agreement . . . is made in consideration for the continued at-will employment of the Employee, the benefits and compensation provided by Company to Employee, and Employee's and Company's mutual agreement to arbitrate as provided in this Agreement."[15] (Jt. Exh. I p. 55; Jt. Exh. J p. 56.) Generally, when a contract is involved, the arbitration agreement is a means to solve a contract dispute, and the terms of the agreement spell out independent consideration. For example, in *Allied-Bruce Terminix*, consideration for the termite bond at issue was money. In *Buckeye Check Cashing*, individuals entered into "various deferred-payment transactions with . . . Buckeye . . . in which they received cash in exchange for a personal check in the amount of the cash plus a finance charge." 546 U.S. at 440. In *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991), the arbitration agreement was part of an application to register with the New York Stock Exchange. In none of these cases was the agreement to arbitrate itself consideration in the "contract evidencing a transaction involving commerce."

The MAA's terms, including the "consideration" of the individual arbitral process, are not implicated until there is an employment dispute. In other words, an employment dispute is a condition precedent to performance under the MAA. In typical transactions, a dispute is not necessary for the terms of the agreement to be exercised. For example, in *Buckeye*, the check cashing company provided cash to the individuals as consideration for the individuals signing over their checks and paying a fee. These transactions could play out indefinitely without the arbitration agreement provision ever coming into play. If the individuals in *Buckeye* performed their end of the bargain by turning over their checks and the check cashing company sat idle, a dispute would arise. Conversely, there would be no need for the check cashing company to do anything if the individual never presented it with a check to cash. Not so here, if the employees' work is part of the consideration. At all times prior to the advent of a covered dispute and the invocation of a way to resolve it, the employer is continuing to employ the employee and the employee is continuing to perform work for the employer. Continued employment triggers no duty on the employer or the employee with regard to the MAA.[16] The employee deciding not to continue employment with the Respondent, without more, likewise triggers no duty under the MAA. It is difficult to see, therefore, how continued employment is part of the "transaction" the MAA evidences.

Simply put, the MAA is a contract about how employment disputes will be resolved. The "transactions" evidenced by the MAA are agreements to arbitrate any and all employment disputes. Yes, the MAA is a condition of employment, but its topic is not the work the employees will perform or the conditions under which they will perform it. An employer engaged in interstate commerce could require employees, as a condition of employment, to sign an agreement stating that they will sit with their coworkers for lunchtime on Tuesdays.[17] The topic of this agreement is not the employee's work duties or the employer's business, but rather who the employees will eat lunch with on Tuesdays. It certainly would seem a stretch to find that this agreement would be a "maritime transaction or a contract evidencing a transaction involving commerce."

As noted above, the MAA applies to all employees. As the Charging Party points out, some disputes covered by the MAA with some of these employees would likely affect commerce, and other minor disputes likely would not. Take the example of a security worker who walks a block to work (not across state lines) at the same Hobby Lobby store each day. It is hard to see how an individual arbitration, required by the MAA, about a disagreement over the timing of this security worker's lunch break evidences any transaction involving commerce. The fact that the employer is engaged in interstate commerce does not, in my view, render any individual agreement to arbitrate an employment dispute as a "contract evidencing a transaction involving commerce" because it is not the employer's business of producing and selling goods in interstate commerce comprising the "transaction" evidenced by the MAA. To interpret the FAA this broadly would finally stretch it to its breaking point.[18]

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regard to the jurisdiction in which any action or special proceeding may be instituted." 218 F.2d 948, 949–950 (2d Cir. 1955).

[13] I have not been asked to decide whether the entire employee handbook is a contract, and make no findings on this point.

There is no evidence here of any contract setting forth payment, duties, etc. of the various employees' jobs, as in *Bernhardt*. This renders the interpretation in this decision narrower than in *Bernhardt* because I am not looking at a broader employment contract, with an agreement to arbitrate disputes embedded in it, and whether that contract has been breached based on the terms of that contract. Instead, I am looking at whether any employment dispute covered by the contract, here the MAA, evidences a transaction involving commerce.

[14] It strikes me as peculiar that the contract to arbitrate itself is the contract at issue to determine applicability of the FAA, rather than an external contract or agreement subject to an arbitration provision. In most cases, the arbitration agreement would kick in if there was a dispute as to performance under the terms of the agreement. Here, a dispute regarding performance under the terms of the MAA would concern whether the employee submitted a covered dispute to arbitration in line with the MAA, or breached the agreement by filing a lawsuit in court.

[15] Oddly, by this language the MAA is in part made in consideration for itself.

[16] Moreover, as the Respondent asserts, employees who have filed class and/or collective lawsuits have not been disciplined, much less been terminated.

[17] Of course, there would be a clause stating that any disputes over this policy would be subject to arbitration.

[18] Many of the Supreme Court Justices, for example, believe the FAA was stretched too far when the Court determined it applied to state court claims. *Southland Corp. v. Keating*, 465 U.S. 1 (1984), Justice O'Connor, joined by Justice Rehnquist, dissenting; See also *Allied-Bruce Terminex*, supra., Justice O'Connor concurring ; Justice Scalia dissenting; Justice Thomas, joined by Justice Scalia, dissenting. Others

Even if the "transaction" the MAA contemplates is employment or continued employment under the MAA's terms, the individual agreements do not necessarily "evidence a transaction involving commerce." As in *Bernhardt*, not all of the Respondent's employees, while performing their duties, are "'in' commerce, . . . producing goods for commerce, or . . . engaging in activity that affect[s] commerce . . . ."

Consideration of the Supreme Court's decision in *Citizens Bank v. Alafabco, Inc*., 539 U.S. 52 (2003), does not lead to a different finding. In *Citizen's Bank*, the Court stated, "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'" 539 U.S. at 56–57, quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co*., 334 U.S. 219, 236, (1948). Citizens Bank and Alafabco, a fabrication and construction company, entered into debt-restructuring agreements that contained an agreement to arbitrate any disputes. The Court rejected the argument that the individual transactions underlying the agreements did not, taken alone, have a "substantial effect on interstate commerce." Id. at 56. First, the Court found that Alafabco engaged in interstate commerce using loans from Citizens Bank that were renegotiated and redocumented in the debt-restructuring agreements. Second, the loans at issue were secured by goods assembled out-of-state. Finally, the Court relied upon the "broad impact of commercial lending on the national economy [and] Congress' power to regulate that activity pursuant to the Commerce Clause." The arbitration agreements between the Respondent and the individual employees in this case do not fall within any of these rationales.

The Charging Party, pointing out that the FAA derives its authority from the Commerce Clause, cites to *National Federation of Independent Businesses v. Sebelius*, 132 S.Ct. 2566 (2012). *Sebelius* discusses the Commerce Clause in relation to Affordable Healthcare Act's (ACA) provision requiring individuals to buy health insurance, commonly known as the individual mandate. In describing the reach of the Commerce Clause in *Sebelius*, the Court observed, "Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching 'activity.'" The Court determined that the "activity" at issue with regard to the individual mandate was the purchase of healthcare insurance, and that under the Commerce Clause, Congress was not empowered to regulate the failure to engage in this activity. Under this analysis, the "activity" the MAA concerns is resolution of employment disputes. For the reasons described above, this "activity" does not necessarily affect interstate commerce, particularly in cases where no dispute with regard to employment under the MAA ever arises.

Based on the foregoing, I agree with the Charging Party that the Respondent has made no showing that an arbitration agreement between the Respondent and any of its individual employees affects commerce.[19]

4. Team truckdrivers

The Charging Party further argues that team truck drivers who transport the Respondent's products across state lines are a class of workers engaged in interstate commerce, and therefore fall within FAA's exception at 9 U.S.C. § 1. The Court in *Circuit City* held that "Section 1 exempts from the FAA only contracts of employment of transportation workers." The interstate truck drivers are clearly transportation workers, a fact not disputed by the Respondent, and therefore are exempt from the FAA. Requiring the team truck drivers to sign and adhere to the MAA therefore violates the Act, regardless of the Board's decisions in *D. R. Horton* and related cases.

B. Enforcement of the MAA

Complaint paragraphs 4(e) and 5 allege that the Respondent violated Section 8(a)(1) of the Act by enforcing the MAA, as detailed above.

It is well settled that an employer violates Section 8(a)(1) by enforcing a rule that unlawfully restricts Section 7 rights. See, e.g., *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 16–17 (1962); *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945).

Here, it is undisputed that the Respondent enforced the MAA by filing motions to compel individual arbitration in *Fardig* and *Ortiz*, as detailed above. (Jt. Exhs. Y, Z). The Respondent contends that the Board lacks authority to enjoin the Respondent's motions to compel because they are protected by the First Amendment under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983), and *BE&K Construction CO. v. NLRB*, 536 U.S. 516 (2002). I find that instant case falls within the exception set forth in Bill Johnson's at footnote 5, which states in relevant part:

> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits. . . . Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act, see *Granite State Joint Board, Textile Workers Union*, 187 N.L.R.B. 636, 637 (1970), enforcement denied, 446 F.2d 369 (CA1 1971), rev'd, 409 U.S. 213, 93 S.Ct. 385, 34 L.Ed.2d 422 (1972); *Booster Lodge No. 405, Machinists & Aerospace Workers*, 185 N.L.R.B. 380, 383 (1970), enforced

believe it was stretched too far when it was held to apply to employment contracts. *Circuit City,* supra, Justice Stevens, joined by Justices Ginsburg, Breyer, and Souter, dissenting; Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, dissenting.

[19] As the party asserting the FAA as an affirmative defense, the Respondent has the burden of proof to show that the agreements at issue are subject to the FAA. The assertion of the FAA as an affirmative defense requires me to address its reach in this decision. Though, as the Respondent notes, many courts have disagreed with the Board's rationale in *D. R. Horton*, et. al., the precise issue of whether a particular agreement to arbitrate is a "maritime transaction or a contract evidencing a transaction involving commerce" has not been squarely addressed.

> in relevant part, 148 U.S.App.D.C. 119, 459 F.2d 1143 (1972), aff'd, 412 U.S. 84, 93 S.Ct. 1961, 36 L.Ed.2d 764 (1973), and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction "where [the Board's] federal power preempts the field." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S.Ct. 373, 377, 30 L.Ed.2d 328 (1971).

The Board has determined that these exceptions apply in the wake of *Bill Johnson's* and *BE&K Construction*. See, e.g., *Allied Trades Council (Duane Reade Inc.)*, 342 NLRB 1010, 1013, fn. 4 (2004); *Teamsters, Local 776 (Rite Aid)*, 305 NLRB 832, 835 (1991). Moreover, particular litigation tactics may fall within the exception even if the entire lawsuit may not be enjoined. *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000); *Dilling Mechanical Contractors*, 357 NLRB 544 (2011). As such, since the Board has concluded that agreements such as those comprising the MAA explicitly restrict Section 7 activity, the Respondent's attempt to enforce the MAA in state court by moving to compel arbitration fall within the unlawful objective exception in *Bill Johnson's*. See *Neiman Marcus Group*, supra.

The Respondent argues that numerous courts have found agreements such as the MAA to be lawful and enforceable. While this is true, the Board has held that agreements such as the MAA violate the Act, and the Supreme Court has not ruled otherwise. The Respondent, by its actions in court, is challenging Board case law which very clearly holds the MAA violates the Act. The motion to compel arbitration, which by virtue of the MAA can only be on an individual basis, is the crux of the challenge. Inherent in this challenge are risks, which the Respondent is assuming by declining to follow the Board's case law as it works its way through the system.

C. The MAA and Board Charges

Complaint paragraphs 4(b) and 5 allege that the Respondent violated Section 8(a)(1) by maintaining, at all material times since at least April 28, 2014, which would reasonably be read by employees to prohibit them from filing unfair labor practice charges with the Board.

The *Lutheran Heritage* test set forth above applies to this allegation. I find that employees would reasonably construe the MAA as restricting their access to file charges with the Board.

The MAA is worded very broadly, and explicitly states it applies to "any dispute, demand, claim, controversy, cause of action, or suit (collectively referred to as "Dispute") that Employee may have" at any time that that "in any way arises out of, involves, or relates to Employee's employment" with the Respondent. This would certainly encompass an unfair labor practice charge with the Board.

More specifically, the MAA includes disputes involving:

> wrongful termination, wages, compensation, work hours, . . . sexual harassment, harassment and/or discrimination based on any class protected by federal, state or municipal law, and all Disputes involving interference and/or retaliation relating to workers' compensation, family or medical leave, health and safety, harassment, discrimination, and/or the opposition of harassment or discrimination, and/or any other employment-related Dispute.

Certainly, disputes about wrongful termination, wages, compensation, and hours could comprise unfair labor practice claims. Discrimination based on Section 7 activity also is encompassed by this language.

The MAA then proceeds to state it applies to disputes under various federal laws, ending with a catchall that it applies to disputes under :

> all other federal, state, and municipal statutes, regulations, codes, ordinances, common laws, or public policies that regulate, govern, cover, or relate to equal employment, wrongful termination, wages, compensation, work hours, invasion of privacy, false imprisonment, assault, battery, malicious prosecution, defamation, negligence, personal injury, pain and suffering, emotional distress, loss of consortium, breach of fiduciary duty, sexual harassment, harassment and/or discrimination based on any class protected by federal, state or municipal law, or interference and/or retaliation involving workers' compensation, family or medical leave, health and safety, harassment, discrimination, or the opposition of harassment or discrimination, and any other employment-related Dispute in tort or contract.

That this would encompass some claims under the NLRA requires no explanation. The only claims explicitly excluded are benefits under unemployment compensation laws or workers' compensation laws.

The Respondent contends that the MAA would not be interpreted to apply to Board charges because of the following language:

> By agreeing to arbitrate all Disputes, Employee and Company understand that they are not giving up any substantive rights under federal, state or municipal law (including the right to file claims with federal, state or municipal government agencies).

The Respondent contends that because of the explicit statement that claims with federal, state, or municipal agencies are excluded from the MAA, any misinterpretation of the MAA would be manifestly unreasonable. I disagree.

To begin with, the MAA specifically states claims of sexual harassment, harassment and/or discrimination based on any class protected by federal law are subject to mandatory individual arbitration. These are all patently clear examples of claims that arise under the civil rights statutes the Equal Employment Opportunity Commission (EEOC) enforces, i.e., Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.[20] Yet the MAA also states that nothing would preclude an employee from filing a charge with a federal agency, ostensibly including the EEOC.[21] The only way to reconcile these two provisions is to read the MAA as not precluding filing a charge with an ad-

[20] These statutes are respectively codified at 42 U.S.C. 2000e et seq.; 42 U.S.C. 121-1 et seq; and 20 U.S.C. 633a.

[21] The EEOC's charge-filing process is described at http://eeoc.gov/employees/howtofile.cfm.

ministrative agency, yet in the end those disputes must be resolved only through final and binding arbitration under the MAA rather than through whatever fruits filing a charge or other similar effort may bear. The same rationale holds true for Board proceedings, given that the MAA requires individual arbitration of disputes over "wrongful termination, wages, compensation, work hours." This begs the question: Why would any employee bother to file a charge? A reasonable employee, not versed in how various federal, state, and local agencies process claims, would take it at face value that the topics specifically included as falling within the MAA would be subject to arbitration. This is particularly true given that the MAA explicitly excludes benefits under unemployment compensation laws or workers' compensation laws, but not under the NLRA.

Considering that ambiguities must be construed against the drafter of the MAA, which is the Respondent, I find the MAA violates Section 8(a)(1) because employees would reasonably believe the MAA requires arbitration of employment-related claims covered by the Act. See *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995).

CONCLUSIONS OF LAW

(1) The Respondent, Hobby Lobby Stores, Inc., is an employer within the meaning of Section 2(6) and (7) of the Act.

(2) The Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement (MAA) requiring all employment-related disputes to be submitted to individual binding arbitration.

(3) The Respondent violated Section 8(a)(1) of the Act when it enforced the MAA by asserting the MAA in litigation the Charging Party brought against the Respondent.

(4) The Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the MAA is unlawful, the recommended order requires that the Respondent revise or rescind it in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees' right to file charges with the National Labor Relations Board. The Respondent shall notify all current and former employees who were required to sign the mandatory arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement. Because the Respondent utilized the MAA on a corporatewide basis, the Respondent shall post a notice at all locations where the MAA, or any portion of it requiring all employment-related disputes to be submitted to individual binding arbitration, was in effect. See, e.g., *U-Haul Co. of California*, supra, fn. 2 (2006); *D. R. Horton,* supra, slip op. at 17; *Murphy Oil*, supra.

I recommend the Respondent be required to notify the U.S. District Court for the Eastern District of California in *Ortiz v. Hobby Lobby Stores, Inc.,* 2:13-cv-01619-TLN-DAD (E.D. Cal.), and the U.S. District Court for the Central District of *California in Fardig v. Hobby Lobby Stores, Inc*., 8:14-cv-00561-JVSAN (C.D. Cal.), that it has rescinded or revised the mandatory arbitration agreements upon which it based its motion to dismiss these actions and to compel individual arbitration of the claims, and inform the court that it no longer opposes the actions on the basis of the arbitration agreement.

I recommend the Company be required to reimburse employees for any litigation and related expenses, with interest, to date and in the future, directly related to the Company's filing its motion to compel arbitrations in *Ortiz v. Hobby Lobby Stores, Inc*., 2:13-cv-01619-TLN-DAD (E.D. Cal.), and *Fardig v. Hobby Lobby Stores*, Inc., 8:14-cv-00561-JVSAN (C.D. Cal.). Determining the applicable rate of interest on the reimbursement will be as outlined in *New Horizons*, 283 NLRB 1173 (1987), (adopting the Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to the employees shall be computed on a daily basis as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The Respondent, Hobby Lobby Stores, Inc., Oklahoma City, Oklahoma, with a place of business in Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining and/or enforcing a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign the mandatory arbitration agreement in any form

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Notify the U.S. District Court for the Eastern District of California in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.), and the U.S. District Court for the Central District of California in *Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVSAN (C.D. Cal.), that it has rescinded or revised the mandatory arbitration agreement upon which it based its motions to dismiss the class and collective actions and to compel individual arbitration of the employees' claim, and inform the respective courts that it no longer opposes the actions on the basis of the arbitration agreement.

(d) In the manner set forth in this decision, reimburse the plaintiffs who filed suit in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.), and *Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVSAN (C.D. Cal.), for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing the Respondent's motion to dismiss the wage claim and compel individual arbitration.

(e) Within 14 days after service by the Region, post at all facilities in California the attached notice marked "Appendix A," and at all other facilities employing covered employees, copies of the attached notice marked "Appendix B."[23] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 28, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 8, 2015

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign the mandatory arbitration agreement in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, we will provide them a copy of the revised agreement.

WE WILL notify the courts in which the employees filed their claims in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.), and *Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVSAN (C.D. Cal.), that we have rescinded or revised the mandatory arbitration agreement upon which we based our motion to dismiss her collective wage claim and compel individual arbitration, and we will inform the court that we no longer oppose the employees' claims on the basis of that agreement.

WE WILL reimburse the plaintiffs in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.), and *Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVSAN (C.D. Cal.), for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing our motion to dismiss her collective wage claim and compel individual arbitration.

HOBBY LOBBY STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20–CA–139745 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign the mandatory arbitration agreement in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, we will provide them a copy of the revised agreement.

HOBBY LOBBY STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20–CA–139745 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

No. 12-60031

D.R. HORTON, INC. v. NATIONAL LABOR RELATIONS BOARD

PETITIONER/CROSS-RESPONDENT D.R. HORTON, INC.'S RECORD EXCERPTS

Tab 7
Regional Director's partial refusal to issue complaint on Michael Cuda's unfair labor practice charge, dated Aug. 29, 2008

Resp't Ex. 3

ER 1

United States Government
NATIONAL LABOR RELATIONS BOARD
Region 12
201 East Kennedy Boulevard, Suite 530
Tampa, Florida 33602-5824

Telephone 813-228-2641
Fax 813-228-2874
www.nlrb.gov

August 29, 2008

Mr. Michael Cuda
c/o Richard Ceilar, Esq.
Morgan & Morgan
7450 Griffin Road, Suite 230
Davie, FL 33314

Re: D.R. Horton, Inc.
Case 12-CA-25764

Dear Mr. Cuda:

The Region has carefully investigated and considered your charge against D.R. Horton, Inc. alleging violations under Section 8 of the National Labor Relations Act.

Partial Decision to Dismiss: Based on that investigation, I have concluded that further proceedings are not warranted with respect to the allegation that the Employer maintained and enforced a provision in its Mutual Arbitration Agreement that prohibits employees from pursuing class action grievances, and I am dismissing this portion of your charge for the following reasons:

Your charge alleges that D.R. Horton, Inc., (the Employer) maintained and enforced a rule in its Mutual Arbitration Agreement prohibiting employees from joining their claims in arbitration and maintaining class action arbitrations. It has been determined that, based on the facts of this case, the application of the class action mechanism is primarily a procedural device and the effect on Section 7 rights of prohibiting its use is not significant. While Section 7 prohibits the Employer from denying employees the ability to seek collective relief of their claims, the Employer is also not required to assist employees in bringing their collective claims via the procedural mechanism of class action arbitrations.

Accordingly, the evidence is insufficient to establish that the Employer violated the Act by maintaining and enforcing a rule prohibiting class action arbitrations to the extent they sought relief for a class of unnamed employees, and I am refusing to issue complaint with respect to that portion of this charge. The allegation that the Employer maintained and enforced a rule in its Mutual Arbitration Agreement prohibiting employees from joining their claims in arbitration remains pending.

Your Right to Appeal: The National Labor Relations Board Rules and Regulations permit you to obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board. Use of the Appeal Form (Form NLRB-4767) will satisfy this requirement. However, you are encouraged to submit a complete statement setting forth the facts and reasons why you believe that the decision to dismiss your charge was incorrect.

The appeal may be filed by regular mail addressed to the General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1099 14th Street, N.W., Washington D.C. 20570-0001. A copy of the appeal should also be mailed to me.

An appeal may also be filed electronically by using the E-filing system on the Agency's Website. In order to file an appeal electronically, please go to the Agency's Website at www.nlrb.gov and under ***E-Gov*** select ***E-Filing***, then scroll to *General Counsel's Office of Appeals*. Select the type of document you wish to file electronically and you will navigate to detailed instructions on how to file an appeal electronically.

The appeal MAY NOT be filed by facsimile transmission.

Appeal Due Date: The appeal must be received by the General Counsel in Washington D. C. by the close of business at 5:00 p.m. (ET) on **September 12, 2008.** If you mail the appeal, it will be considered timely filed if it is postmarked no later than one day before the due date set forth above. If you file the appeal electronically, it must be received by the General Counsel by the close of business at 5:00 p.m. (ET) on **September 12, 2008.** A failure to timely file an appeal electronically will not be excused on the basis of a claim that transmission could not be accomplished because the receiving machine was off-line or unavailable, the sending machine malfunctioned, or for any other electronic-related reason.

Extension of Time to File Appeal: Upon good cause shown, the General Counsel, may grant you an extension of time to file the appeal. You may file a request for an extension of time to file by mail, facsimile transmission, or through the Internet. The fax number is (202) 273-4283. Special instructions for requesting an extension of time over the Internet are set forth in the attached Access Code Certificate. While an appeal will be accepted as timely filed if it is postmarked no later than one day prior to the appeal due date, this rule does not apply to requests for extension of time. A request for an extension of time to file an appeal **must be received** on or before the original appeal due date. A request that is postmarked prior to the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed through the Internet, a copy of any request for extension of time should be sent to me.

Confidentiality/Privilege: Please be advised that we cannot accept any limitations on the use of any appeal statement or evidence in support thereof provided to the Agency. Thus, any claim of confidentiality or privilege cannot be honored, except as provided by the FOIA, 5 U.S.C. 552, and any appeal statement may be subject to discretionary disclosure to a party upon request during the processing of the appeal. In the event the appeal is sustained, any statement or material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. Further, we are required by the Federal Records Act to keep copies of documents used in our case handling for some period of years after a case closes. Accordingly, we may be required by the FOIA to disclose such records upon request, absent some applicable exemption such as those that protect confidential source, commercial/financial information or personal privacy interests (e.g., FOIA Exemptions 4, 6, 7(C) and 7(D), 5 U.S.C. § 552(b)(4), (6), (7)(C), and 7(D)). Accordingly, we will not honor any requests to place limitations on our use of appeal statements or supporting evidence beyond those prescribed by the foregoing laws, regulations, and policies.

Notice to Other Parties of Appeal: You should notify the other party(ies) to the case that an appeal has been filed. Therefore, at the time the appeal is sent to the General Counsel, please complete the enclosed Appeal Form (NLRB-4767) and send one copy of the form to all parties whose names and addresses are set forth in this letter.

Very truly yours,

Rochelle Kentov

Rochelle Kentov
Regional Director

Enclosures:
Form NLRB-4767, Appeal form
Form NLRB-5503, Access Code Certificate

General Counsel, Office of Appeals
National Labor Relations Board
1099 14th Street NW, Room 8820
Washington, DC 20570

D.R. Horton, Inc.
301 Commerce Street, #500
Fort Worth, TX 76102

Mark M. Stubley, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, PC
300 N. Main Street, Suite 500
Post Office Box 2757
Greenville, SC 29602

Michael Tricarico, Esq.
701 Brickell Avenue, #2020
Miami, FL 33131

No. 12-60031

D.R. HORTON, INC. v. NATIONAL LABOR RELATIONS BOARD

PETITIONER/CROSS-RESPONDENT D.R. HORTON, INC.'S RECORD EXCERPTS

Tab 6
Office of Appeals' ruling on Michael Cuda's appeal from Regional Director's partial refusal to issue complaint, dated June 16, 2010

Resp't Ex. 2

ER 2

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

June 16, 2010

Re: D.R. Horton, Inc.
Case No. 12-CA-25764

Richard Cellar, Esq.
Morgan & Morgan
7450 Griffin Road, Suite 230
Davie, FL 33314

Dear Mr. Cellar:

Your appeal from the Regional Director's partial refusal to issue complaint in the above captioned matter has been carefully considered.

The appeal is sustained insofar as it pertains to the allegation that the Employer violated Section 8(a)(1) of the National Labor Relations Act by maintaining an agreement which, on its face, prohibits employees from filing class action claims and which could be read as precluding employees from joining together to challenge the validity of the waiver by filing a class action lawsuit. In this regard, it was concluded that the Mutual Arbitration Agreement raises issues warranting Board consideration, absent settlement.

The appeal is denied, however, insofar as it pertains to the Employer's refusal to entertain a class action grievance filed by the Charging Party. Even assuming that the Charging Party was acting in concert with other employees in filing a class action grievance, an employer is not required to litigate class action claims within the context of its own private dispute resolution system.

Accordingly, the case is remanded to the Regional Director with instructions to issue an appropriate Section 8(a)(1) complaint consistent with the above determination, absent settlement. All further inquiries should be addressed to the Regional Director.

Sincerely,

Ronald Meisburg
General Counsel

By Yvonne D. Dixon
Yvonne D. Dixon, Director
Office of Appeals

cc: Rochelle Kentov, Regional Director
National Labor Relations Board
South Trust Plaza, Suite 530
201 East Kennedy Blvd.
Tampa, FL 33602

D.R. Horton, Inc.
301 Commerce Street, #500
Fort Worth, TX 76102

Michael Tricarico, Esq.
701 Brickell Avenue, #2020
Miami, FL 33131

Mark M. Stubley, Esq.
Ogletree, Deakins, Nash, Smoak
& Stewart, PC
300 North Main Street, Suite 500
P.O. Box 2757
Greenville, SC 29602

Michael Cuda
c/oMorgan & Morgan
7450 Griffin Road, Suite 230
Davie, FL 33314

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No. 12-60031

D.R. HORTON, INC. v. NATIONAL LABOR RELATIONS BOARD

PETITIONER/CROSS-RESPONDENT D.R. HORTON, INC.'S RECORD EXCERPTS

Tab 11
General Counsel's Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers' Mandatory Arbitration Policies, dated June 16, 2010

GC Memo

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 10-06 June 16, 2010

To: All Regional Directors, Officers-in-Charge and Resident Officers

From: Ronald Meisburg, General Counsel

Subject: Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers' Mandatory Arbitration Policies

Issues have arisen regarding the validity of mandatory arbitration agreements that prohibit arbitrators from hearing class action employment claims while at the same time requiring employees to waive their right to file any claims in a court of law, including class action claims. This Guideline Memorandum describes the legal framework to use in considering these and related issues when they arise in the future.[1]

Briefly summarized, Section 7 of the NLRA guarantees employees the right to engage in concerted activities for the purpose of mutual aid and protection. In *Eastex, Inc., v. NLRB*,[2] the Supreme Court recognized that the right of employees to act concertedly under Section 7 includes the right to be free from employer retaliation when employees seek to improve their working conditions by resort to administrative and judicial forums. To hold such activity unprotected "would leave employees open to retaliation for much legitimate activity that could improve their lot as employees."[3] At the same time, however, the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp. (Gilmer),*[4] determined that an employer can require an employee, as a condition of employment, to channel his or her individual non-NLRA employment claims into a private arbitral forum for resolution. The orderly development of the law under the Act and the sound exercise of prosecutorial discretion by the General Counsel demand that we take account of the long term, well developed body of case law in this area.

Cases coming before the General Counsel have raised the question whether there is a conflict between the Board law protecting employees who concertedly seek to vindicate their employment rights in court and the court law upholding individual waivers of the right to pursue class action relief. Resolving this important question requires

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[1] This memorandum only covers mandatory arbitration agreements unilaterally imposed by employers in non-union settings. Such agreements between employers and individual employees may be dissolved upon the employees' selection of an exclusive bargaining representative pursuant to Section 9(a) of the NLRA. See *J.I. Case Co. v. NLRB,* 321 U.S. 332 (1944); *14 Penn Plaza v. Pyett,* ___U.S. ___, 129 S.Ct. 1456 (2009).

[2] 437 U.S. 556, 565-66 (1978).

[3] Id.

[4] 500 U.S. 20, 31 (1991).

careful attention to the precise scope of the rights afforded to employers and employees under the relevant statutes. In addition, all the legitimate interests of the affected parties should be weighed in the balance. It should not be overlooked that employers and employees alike may derive significant advantages from arbitrating claims rather than adjudicating them in a court of law. For example, employers have a legitimate interest in controlling litigation costs, and employees too can benefit from the relative simplicity and informality of resolving claims before arbitrators.

Analysis of mandatory arbitration programs should be guided by the following principles:

(1) The concerted filing of a class action lawsuit or arbitral claim seeking to enforce employment statutes is protected by Section 7 of the Act, and if an employer threatens, disciplines or discharges an employee for such concerted activity, the employer violates Section 8(a)(l) of the NLRA.

(2) Any mandatory arbitration agreement established by an employer may not be drafted using language so broad that a reasonable employee could read the agreement and/or related employer documents as conditioning employment on a waiver of Section 7 rights, such as joining with other employees to file a class action lawsuit to improve working conditions.

(3) Nonetheless, an employer's conditioning employment on an employee's agreeing that the employee's individual non-NLRA statutory employment claims will be resolved in an arbitral forum is permissible under the Supreme Court's holding in *Gilmer,* supra. The validity of such individual employee forum waivers is normally determined under non-NLRA law, such as the Federal Arbitration Act and the employment statutes at issue.

(4) So long as the wording of these individual forum waiver agreements makes clear to employees that their Section 7 rights are not waived and that they will not be retaliated against for concertedly challenging the validity of those agreements through class or collective actions seeking to enforce their employment rights, an employer does not violate Section 7 by seeking the enforcement of an individual employee's lawful *Gilmer* agreement to have all his or her individual employment disputes resolved in arbitration. Similarly, an employer may lawfully seek to have a class action complaint dismissed on the ground that each purported class member is bound by his or her signing of a lawful *Gilmer* agreement/waiver.

In sum, if mandatory arbitration agreements are drafted to make clear that the employees' Section 7 rights to challenge those agreements through concerted activity are preserved and that only individual rights are waived, no issue cognizable under the NLRA is presented by an employer's making and enforcing an individual employee's agreement that his or her non-NLRA employment claims will be resolved through the employer's mandatory arbitration system. In such cases, an employer is acting in accord with its rights under *Gilmer* and its progeny.

I. ANALYSIS

1. The concerted filing of a class action lawsuit or arbitral claim is protected activity.

The Board has found protected concerted activity to include the filing of collective and class action lawsuits regarding employment matters. For example, in *Trinity Trucking & Materials Corp.*,[5] the Board held that the filing of a lawsuit by a group of employees alleging that their employer had failed to pay them contract scale was protected activity. In *Le Madri Restaurant*,[6] the Board found that an employer unlawfully discharged two employees for engaging in protected concerted activity, which included filing a lawsuit in federal court on behalf of 17 other employees. The lawsuit alleged violations of federal and state labor laws. In *Novotel New York*,[7] the Board found that an "opt-in" class action lawsuit alleging employer violations of the Fair Labor Standards Act ("FLSA") was protected concerted activity. In *United Parcel Service, Inc.*,[8] the Board found that an employer unlawfully discharged an employee for bringing a class action lawsuit regarding employee rest breaks. Most recently, the Board in *Saigon Gourmet*[9] concluded that the employer violated the Act when it promised to raise delivery workers' wages if they abandoned their plan to file a wage and hour lawsuit and by discharging employees because they engaged in protected concerted activities. The Board acknowledged that the employer "knew that employees were preparing to file a wage and hour lawsuit, [which is] clearly protected concerted activity . . . [.]".[10]

In light of the above precedent, class action lawsuits that can be characterized as having been filed by employees for their mutual aid and protection implicate NLRA rights. Unlike other statutory contexts—where a class action lawsuit could be viewed as merely a procedural mechanism for enforcing a separate underlying right—the NLRA's cornerstone principle is that employees are empowered to band together to advance their work-related interests on a collective basis.

This conclusion, however, should not be read as overstating that all class action lawsuits or grievances involve protected concerted activity. Such claims also must continue to be analyzed under the standard for "concerted activity" set forth by the

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[5] 221 NLRB 364, 365 (1975), enfd. mem. 567 F.2d 391 (7th Cir. 1977), cert. denied 438 U.S. 914 (1978) (contrary decision by arbitrator deemed repugnant to the purposes of the Act).
[6] 331 NLRB 269, 275-76 (2000).
[7] 321 NLRB 624, 633-636 (1996) (union did not engage in objectionable pre-election conduct by aiding employee lawsuit).
[8] 252 NLRB 1015, 1018, 1022 & fn. 26 (1980), enfd. 677 F.2d 421 (6th Cir. 1982) (employee initiated and filed class action lawsuit, including circulating petition among employees to join suit; "[i]t is well settled that activities of this nature are concerted, protected activities[.]").
[9] 353 NLRB No. 110, see fn. 4, supra.
[10] Id., slip op. at 1.

Board in *Meyers* and its progeny.[11] In addition, class action lawsuits—like any employee lawsuits—are not protected by Section 7 if brought for a forbidden object or if the allegations are knowingly and recklessly false or pursued in bad faith.[12] Moreover, while employees have the right to request class action status from a court or arbitrator, they do not have the right to be granted such status if the claims at issue do not satisfy class action standards such as commonality, numerosity, etc. That said, a mandatory arbitration agreement that prohibits all class action grievances and lawsuits necessarily inhibits some protected activity.

2. A mandatory arbitration agreement that could reasonably be read by an employee as prohibiting him or her from joining with other employees to file a class action lawsuit is unlawful.

Because, as discussed above, employees have a Section 7 right concertedly to seek to enforce their statutory employment rights before courts and other administrative tribunals, an employer's conditioning employment on an employee's waiving his or her right to engage in concerted activity would violate fundamental employee rights.[13] For similar reasons, a mandatory arbitration agreement that could be reasonably read by an employee as prohibiting him or her from joining with other employees to file a class action amounts to an overly broad employer rule and hence is unlawful.[14]

Possible modifications for remedying an overly broad mandatory arbitration agreement would include the insertion of language in the agreement assuring

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[11] See *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), reaffirmed, *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988) (stating that concerted activity cannot be presumed, and only group activity—two or more employees acting together, or an individual seeking to initiate/invoke group activity, or activity by one who raises a group complaint to the employer—is concerted.

[12] *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990) (union violated §8(b)(4)(ii)(A) by filing grievance predicated on a contract construction that, if accepted, would render the contract provision violative of §8(e)); *Leviton Mfg. Co.*, 203 NLRB 309 (1973) (employees' filing of civil suit against employer is protected activity absent proof that proceeding was commenced maliciously or in bad faith) enf. denied 486 F.2d 686 (1st Cir. 1973) (finding bad faith); *Altex Ready Mixed Concrete Corp.*, 223 NLRB 696, 699-700 (1976), enfd. 542 F.2d 295 (5th Cir. 1976) (charge that employee provided a knowingly false affidavit in support of union injunction not proven).

[13] See e.g., *Barrow Utilities and Electric,* 308 NLRB 4, 11, fn. 5 (1992) ("The law has long been clear that all variations of the venerable 'yellow dog contract' are invalid as a matter of law."); *Eddyleon Chocolate Co.*, 301 NLRB 887 (1991) ("It is axiomatic that such agreements and their solicitation are barred under the 8(a)(1) prohibition of coercion directed at employee exercise of rights protected by Section 7.").

[14] See *U-Haul Company of California, Inc.*, 347 NLRB 375, 377-78 (2006), enfd. 2007 WL 4165670 (D.C. Cir. 2007), (employer interfered with employee rights by maintaining a mandatory arbitration policy that employees would reasonably construe to prohibit the filing of unfair labor practice charges with the Board).

employees: (i) that the employer's arbitration agreement does not constitute a waiver of employees' collective rights under Section 7, including the employees' right concertedly to pursue any covered claim before a state or federal court on a class, collective, or joint action basis; (ii) that the employer recognizes the employees' right concertedly to challenge the validity of the forum waiver agreement upon such grounds as may exist at law or in equity; and (iii) that no employee will be disciplined, discharged, or otherwise retaliated against for exercising their rights under Section 7.

3. Supreme Court and circuit court precedent establishes that employers, nonetheless, may require individual employees to sign a *Gilmer* waiver of their right to file a class or collective claim without *per se* violating the Act.

In *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) *(Gilmer)*, the Supreme Court decided that an employer could require an employee, as a condition of employment, to channel his or her individual non-NLRA employment claims to a private arbitral forum for resolution. The courts of appeals have extended *Gilmer* in holding that employment agreements that require the employee to waive the filing of class or collective claims both in court and in the employer's arbitration procedure are not *per se* unenforceable. See, e.g., *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Horenstein v. Mortgage Market, Inc.*, 9 Fed.Appx. 618, 619, 2001 WL 502010, 1 (9th Cir. 2001). Rather, the legitimacy of such programs is tested under the standards of the Federal Arbitration Act, which provides that pre-dispute arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, courts have upheld an individual's waiver of the right to seek class action relief both in arbitration and in court so long as the court is satisfied that class action relief is not essential to the vindication of the particular substantive law at issue. Compare *Johnson v. West Suburban Bank*, 225 F.3d 366, 368-378 (3d Cir. 2000) and *Carter v. Countrywide Credit Industries, Inc.*, supra at 298 with *Kristian v. Comcast Corp.*, 446 F.3d 25, 53-61 (1st Cir. 2006). The validity of such individual employee forum waivers is normally determined by reference to the employment law at issue and does not involve consideration of the policies of the National Labor Relations Act.

These cases should not be regarded differently under the NLRA just because an individual employee, in waiving his or her right to a judicial forum, is also in effect waiving his or her individual right to pursue a class action. Although these courts have not analyzed individual class action waivers with the provisions of Section 7 of the NLRA in mind, Section 7 does not require a different outcome. Under the principles enunciated in *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), remanded, 755 F.2d 941, 957 (D.C. Cir. 1985), reaffirmed, *Meyers Industries (Meyers* 11), 281 NLRB 882, 887 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987), Board law requires a careful distinction between purely individual activity and concerted activity for mutual aid and protection. *Holling Press, Inc.*, 343 NLRB 301, 302 (2004); *United Pacific Insurance*, 270 NLRB 981, 982 (1984), review denied sub nom. *Whitman v. NLRB*, 767 F.2d 935 (9th Cir. 1985) (Table). While an employer may not condition employment on its employees' waiving collective rights protected by the NLRA, individual employees

possessed of an individual right to sue to enforce non-NLRA employment rights can enter into binding individual agreements regarding the resolution of their individual rights in arbitration. So long as purely individual activity is all that is at issue in the individual class action waiver cases that have been upheld under *Gilmer*, the results of those cases are consistent with extant Board law.

No merit was found in arguments that, while a *Gilmer* forum waiver alone may not raise Section 7 issues, an employer's demand that employees agree not to institute a class action to further his or her individual claims does implicate Section 7, because filing a class action is inherently concerted activity on behalf of others. It was concluded that an individual's pursuing class action litigation for purely personal reasons is not protected by Section 7 merely because of the incidental involvement of other employees as a result of normal class action procedures. Similarly, an individual employee's agreement not to utilize class action procedures in pursuit of purely personal individual claims does not involve a waiver of any Section 7 right. To conclude otherwise would be a return to the concept of "constructive concerted activity" that the Board rejected in *Meyers Industries (Meyers I)*, 268 NLRB 493, 495-496 (1984), remanded, 755 F.2d 941, 957 (D.C. Cir. 1985), reaffirmed, *Meyers Industries (Meyers II)*, 281 NLRB 882, n.11 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987) (overruling the holding in *Alleluia Cushion Co.*, 221 NLRB 999, 1000 (1975) that a single employee's seeking to enforce statutory provisions "designed for the benefit of all employees" is concerted activity "in the absence of any evidence that fellow employees disavow such representation"). So expanding the concept of "concerted activity" would also have the effect of overturning cases such as *Carter v. Countrywide Credit Industries, Inc.,* 362 F.3d 294, 298 (5th Cir. 2004), thereby disserving the Congressional objectives that have been recognized in *Gilmer* and its progeny.

For these reasons, it is concluded that no Section 7 right is violated when an employee possessed of an individual right to sue enters such a *Gilmer* agreement as a condition of employment and that no Section 7 right is violated when that individual agreement is enforced.

4. Even if an employee is covered by an arrangement lawful under *Gilmer*, the employee is still protected by Section 7 of the Act if he or she concertedly files an employment-related class action lawsuit in the face of that agreement.

Even if Section 7 cannot insulate individual employees from the consequences of lawful individual agreements respecting arbitration of non-NLRA rights, Section 7 does protect the right of those same employees to band together to test the validity of their individual agreements and to make their case to a court that class or collective action is necessary if their statutory employment rights are to be vindicated. He or she cannot be disciplined or discharged for exercising rights under Section 7 by attempting to pursue a class action claim. Rather, the employer's recourse in such situations is to present to the court the individual *Gilmer* waivers as a defense to the class action claim.

II. INSTRUCTIONS FOR PROCESSING CHARGES INVOLVING EMPLOYER AGREEMENTS THAT DENY EMPLOYEES THEIR SECTION 7 RIGHT TO FILE A CLASS ACTION LAWSUIT

In investigating this type of charge, the Regional Offices should examine the wording of all employer documents distributed to and/or signed by employees relating to the employer's mandatory arbitration programs. The Region should carefully investigate whether the activity engaged in by any employee covered by the agreement meets the *Meyers* test for concerted activity. The Region should further investigate whether the employer took action against employees that might be deemed a threat or discipline, and whether the employer discharged or constructively discharged any employee.

To summarize, in cases raising these issues, the following principles are applicable:

1. The concerted filing of a class action lawsuit or arbitral claim is protected activity and if an employer threatens, disciplines or discharges an employee for such concerted activity, the employer violates Section 8(a)(l) of the NLRA.

2. A mandatory arbitration agreement that could reasonably be read by an employee as prohibiting him or her from joining with other employees to file a class action lawsuit is unlawful.

3. Employers, nonetheless, may require individual employees to sign a *Gilmer* waiver of their right to file a class or collective claim without *per se* violating the Act. So long as the wording of these agreements makes clear to employees that their right to act concertedly to challenge these agreements by pursuing class and collective claims will not be subject to discipline or retaliation by the employer, and that those rights—consistent with Section 7—are preserved, no violation of the Act will be found.

4. Even if an employee is covered by an arrangement lawful under *Gilmer,* the employee is still protected by Section 7 of the Act if he or she concertedly files an employment-related class action lawsuit in the face of that agreement and may not be threatened or disciplined for doing so. The employer, however, may lawfully seek to have a class action complaint dismissed by the court on the ground that each purported class member is bound by his or her signing of a lawful *Gilmer* agreement/waiver.

/s/
R.M.

MEMORANDUM GC 10-06

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

D. R. HORTON, INC.

and Case 12-CA-25764

MICHAEL CUDA,
an Individual

ACTING GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF

Submitted by:

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I. INTRODUCTION

Administrative Law Judge William N. Cates (the ALJ) issued his Decision in this case on January 3, 2011, reported at JD(ATL 32-10). On March 14, 2011, Counsel for the Acting General Counsel filed exceptions and a supporting brief with respect to the ALJ's failure to find that Respondent's overly broad mandatory arbitration agreement, violated Section 8(a)(1) of the Act in certain respects and with respect to the ALJ's failure to recommend certain remedies. [1] On April 11, 2011, Respondent filed an answering brief. Counsel for the Acting General Counsel submits this brief in reply to Respondent's answering brief.

This brief addresses Respondent's claim that the General Counsel's position contradicts both court precedent and General Counsel Memo 10-06,[2] and Respondent's objection to a corporate-wide remedy.[3]

II. ARGUMENT

A. The Acting General Counsel's position is consistent with court precedent and with General Counsel's Memorandum 10-06.

Respondent inaccurately characterizes the Acting General Counsel's position, as set forth in the exceptions and supporting brief, as inconsistent with precedent and with the guidelines articulated in General Counsel's Memorandum 10-06, issued on June 16, 2010. Respondent is correct that "an individual employee's agreement not to utilize class action procedures in pursuit of purely personal individual claims does not involve a waiver of any Section 7 rights, and that no Section 7 right is violated when an employee

[1] Respondent filed exceptions and a supporting brief with respect to the ALJ's findings that its mandatory arbitration agreement violated Section 8(a)(1) and (4) of the Act in other respects, and Counsel for the Acting General Counsel filed an answering brief thereto.
[2] See Section A, points 1 and 2 at pages 5-10 of Respondent's answering brief.
[3] See Section B, point 2 at pages 15 to 17 of Respondent's answering brief.

possessed of an individual right to sue enters such a *Gilmer*[4] agreement as a condition of employment and that agreement is later enforced. Thus, Counsel for the Acting General Counsel does not contend that the language in paragraph 6 of Respondent's Mutual Arbitration Agreement (MAA) is per se unlawful. As stated at page 7 of the brief in support of exceptions, an employer has the right to limit arbitration to individual claims – as long as it is clear that there will be no retaliation for concertedly challenging the agreement. The latter element is missing from the MAA.

The issues raised in this case were not squarely presented in *Gilmer* or the other court cases cited by Respondent. For the reasons explained in the Acting General Counsel's exceptions and brief in support of exceptions, and for the additional reasons stated in the ALJ's Decision and the Acting General Counsel's answering brief to Respondent's exceptions, Respondent's "Mutual Arbitration Agreement" (MAA) is overly broad and violates Section 8(a)(1) and (4) of the Act. (JX-2).[5] Thus, an employee can reasonably construe the MAA, read in its entirety, as prohibiting the filing of a class action, collective action, or joint action lawsuit in order to challenge the validity of the agreement itself in a tribunal outside of Respondent's dispute resolution process, in violation of Section 8(a)(1) of the Act. Further, the language of the MAA, on its face, leads employees to reasonably believe they cannot file charges with the Board, in violation of Section 8(a)(1) and (4) of the Act. In summary, the Acting General Counsel's position is consistent with extant case law, including *Gilmer*, and with General Counsel's Memorandum 10-06.

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[4] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).
[5] As used herein ALJD refers to the ALJ's Decision, JX refers to a joint exhibit, GC refers to a General Counsel's exhibit, and T refers to the official transcript.

B. A corporate-wide remedy is appropriate.

Respondent argues in Section B-2 at pages 15 to 17 of its answering brief that there is insufficient evidence in the record to justify the imposition of a corporate-wide remedy. This contention is simply inaccurate.

As the ALJ found, in 2006, on a corporate-wide basis, Respondent implemented a policy of requiring each current and new employee to sign the MAA as a condition of employment. (ALJD p.2, L.23-25). The ALJ's finding is amply supported by the record. Kathleen Shippey, Respondent's Chief Financial Officer and Assistant Corporate Vice President, testified that the Mutual Arbitration Agreement was "rolled out **company-wide** in January of 2006." (T 32-33, emphasis added). In addition, as noted in General Counsel's Exception 2, on January 3, 2008, Respondent counsel Tricarico sent an electronic mail message to Charles Scalise, counsel for Charging Party Michael Cuda, stating, "Attached is the Arbitration Agreement. **Everyone in the company** has executed the same Agreement." (GCX-2; T 21-24, emphasis added). Finally, at the hearing Respondent signed a stipulation which was entered into the record, and states, in relevant part:

> In or around January 2006, Respondent began requiring its employees to execute a Mutual Arbitration Agreement as a condition of employment, which is attached hereto and has been offered into evidence as Joint Exhibit 2. Since in or around January 2006, and continuing to date, Respondent has required its employees to execute a Mutual Arbitration Agreement (Joint Exhibit 2) as a condition of employment.

(JX 1).

Although Respondent claims that there is no record testimony regarding the method that Respondent's Mutual Arbitration Agreement was maintained outside its

Jacksonville, Florida division, the above-cited testimony of Respondent witness Shippey and the electronic mail message sent by Respondent counsel Tricarico demonstrate that the MAA was implemented and maintained on a corporate-wide basis. In addition, the above-quoted stipulation is not limited to Respondent's employees in the Jacksonville division, or to any other sub-group of Respondent's employees. The evidence shows that Respondent admittedly distributed the facially unlawful agreement on a corporate-wide basis, was admittedly maintaining that agreement on a corporate-wide basis as of January 2008, and as of the time of the hearing.[6]

These facts also establish the need for a corporate-wide remedy, including corporate-wide Notice to Employees, regardless of the manner of distribution or the extent of enforcement of the agreement outside the Jacksonville division. The mere maintenance of an overly broad rule or policy, even if it is not enforced, constitutes unlawful interference with employees' Section 7 rights, in violation of Section 8(a)(1) of the Act. *Cintas Corp.*, 344 NLRB 943, 946 (2005), enfd. 482 F.3d 463, 468 (D.C. Cir. 2007); *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). Where an unlawful rule or policy like Respondent's MAA is maintained on a corporate-wide basis, a corporate-wide remedy is appropriate.[7] *Fresh & Easy Neighborhood Market,* 356 NLRB No. 85,

[6] There is no evidence or representation by Respondent to the effect that it has not continued to date to require its employees, on a corporate-wide basis, to execute the MAA as a condition of employment.

[7] The cases cited by Respondent at page 16 of its answering brief are inapposite because the unfair labor practices in those cases were discrete and limited to a single location, unlike the instant case where the unfair labor practices occurred on a corporate-wide basis and therefore have had a corporate-wide impact. *Read's, Inc.*, 228 NLRB 1402 (1977); *Beverly Health & Rehabilitation Services*, 339 NLRB 1243, 1244 (2003); *John J. Hudson, Inc.*, 275 NLRB 874 (1985). It is true that a broad Board order and the posting of notices at employer facilities not directly involved with the specific unfair labor practices being remedied may be required in cases involving respondents with a demonstrated proclivity to violate the Act. *Beverly Health & Rehabilitation Services,* 335 NLRB 635, 640 (2001), enfd. in pertinent part 317 F.3d 316 (D.C. Cir. 2003); *J.P. Stevens & Co.*, 245 NLRB 198 (1979), enfd. in relevant part 638 F.2d 676 (4th Cir. 1980). However, that line of cases has no bearing on the remedy sought in the instant case, where the unfair labor practices were committed throughout the company.

slip op. at 1, fn.1 (2011); *Cintas Corp.*, 344 NLRB 943, 944 (2005), enfd. 482 F.3d 463, 468 (D.C. Cir. 2007).

III. CONCLUSION

In conclusion, Respondent's assertions that the Acting General Counsel's position in this matter is inconsistent with court precedent and with the guidelines set forth in General Counsel's Memorandum 10-06 are erroneous, and the evidence establishes that a corporate-wide remedy is appropriate to eradicate the impact of Respondent's unfair labor practices. Counsel for the Acting General Counsel respectfully submits that the Board should reject the arguments put forth in Respondent's answering brief in their entirety.

Dated at Miami, Florida this 25th day of April, 2011

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

D. R. HORTON, INC.

and Case 12-CA-25764

MICHAEL CUDA, an Individual

CERTIFICATE OF SERVICE

I hereby certify that Counsel for the Acting General Counsel's Reply Brief to Respondent's Answering Brief was duly served upon the following individuals by electronic transmittal on April 25, 2011:

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United States District Court,
C.D. California.

Jeremy FARDIG, et al.
v.
HOBBY LOBBY STORES INC.

No. SACV 14–561 JVS(ANx).
|
Signed June 13, 2014.

Attorneys and Law Firms

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Proceedings: (IN CHAMBERS) Order Granting Defendant's Motion to Dismiss to Compel Arbitration (fld 4/17/14) and Staying Action.

JAMES V. SELNA, Judge.

***1** Karla J. Tunis Deputy Clerk

Defendant Hobby Lobby Stores, Inc. ("Hobby Lobby") moves for an order compelling arbitration of the claims of Plaintiffs Jeremy Fardig ("Fardig"), Jeremy Wright ("Wright"), and Christian Bolin ("Bolin") (collectively "Plaintiffs") on an individual basis. (Mot., Docket No. 11.) Hobby Lobby further moves for an order dismissing the case in its entirety or, in the alternative, staying the case pending the completion of arbitration. (*Id.*) Plaintiffs oppose the motion. (Opp'n, Docket No. 15.) Hobby Lobby has replied. (Reply, Docket No. 16.) For the following reasons, the Court **GRANTS** the motion to compel arbitration and **STAYS** the action pending the completion of arbitration.

I. Background

This putative class action arises out of the employment relationship between Plaintiffs and Hobby Lobby. Fardig, Wright, and Bolin were all employed as non-exempt assistant managers at one or more of Hobby Lobby's California retail stores between 2012 and 2013.[1] (Shatara Decl. Ex. A ("Compl.") ¶¶ 11, 13, 15, Docket No. 7.) As a condition of their employment, Plaintiffs each signed a copy of Hobby Lobby's Mutual Arbitration Agreement ("Arbitration Agreement" or "Agreement").[2] (Mumm Decl. Ex. A–C.)

Under the terms of the Arbitration Agreement, Plaintiffs and Hobby Lobby mutually agreed to arbitrate all disputes arising from Plaintiffs' employment.[3] (*Id.*) The Agreements provide:

> Employee and Company hereby agree that any dispute, demand, claim, controversy, cause of action, or suit ... that Employee may have, at any time following the acceptance and execution of this Agreement, with or against Company ... that in any way arises out of, involves, or relates to Employee's employment with Company or the separation of Employee's employment with Company ... shall be submitted to and settled by final and binding arbitration in the county and state in which Employee is or was employed.
>
> (*Id.*) The Arbitration Agreements further state that "Employee and Company are mutually agreeing to submit all Disputes contemplated in this Agreement to arbitration, rather than to a court." (*Id.*)

There are a few other provisions of the Arbitration Agreements that are relevant to the present motion to compel arbitration. The Agreements provide that any arbitration "shall be conducted pursuant to the American Arbitration Association's National Rules for the Resolution of Employment Disputes or the Institute for Christian Conciliation's Rules of Procedure for Christian Conciliation." (*Id.*) The Agreements also indicate that the employee will select an arbitrator from either the American Arbitration Association ("AAA") or the Institute for Christian Conciliation ("ICC"). (*Id.*) In addition, the parties further agreed that Hobby Lobby shall pay the costs of any such arbitration. (*Id.*) The last notable provision of the Agreements is the waiver of class, collective, and joint claims:

> ***2** The parties agree that all Disputes contemplated in this Agreement shall be arbitrated with Employee and Company as the only parties to the arbitration, and that no Dispute contemplated in

> this Agreement shall be arbitrated, or litigated in a court of law, as part of a class action, collective action, or otherwise jointly with any third party.

(*Id.*)

Plaintiffs filed this action in Orange County Superior Court on February 18, 2014. (Compl.) The Complaint alleges violations of various provisions of the California Labor Code and California Business Professions Code section 17200. (*Id.* ¶¶ 32–76.) Plaintiffs assert these claims on behalf of a putative class of non-exempt managerial employees employed by Hobby Lobby and a putative class of non-exempt retail employees employed by Hobby Lobby. (*Id.* ¶ 24.) Hobby Lobby removed the action to this Court on April 10, 2014. (Not. Removal, Docket No. 1.) Hobby Lobby now seeks to compel the arbitration of Plaintiffs' claims on an individual basis pursuant to the Arbitration Agreements. (Mot.)

II. Legal Standard

The Federal Arbitration Act ("FAA") "was enacted in 1925 in response to widespread judicial hostility to arbitration agreements," and is meant "to ensur[e] that private arbitration agreements are enforced according to their terms." *AT & T Mobility LLC v. Concepcion*, ___ U.S. ___, ___, ___, 131 S.Ct. 1740, 1745, 1748, 179 L.Ed.2d 742 (2011) (internal quotation marks and citations omitted). The FAA reflects a federal policy favoring arbitration, "a fundamental principle that arbitration is a matter of contract," and requires courts to "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *Id.* at 1745 (citations omitted).

Section 2 of the FAA provides that written agreements to arbitrate disputes arising out of transactions involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 936 (9th Cir.2001). Under section 2, "state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, or unenforceability of contracts generally." *Ticknor*, 265 F.3d at 937 (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987)) (internal quotation marks omitted). "Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Ticknor*, 265 F.3d at 937 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686, 116 S.Ct. 1652, 134 L.Ed.2d 902 (2000)) (internal quotation marks omitted). "[W]here a party specifically challenges arbitration provisions as unconscionable and hence invalid, whether the arbitration provisions are unconscionable is an issue for the court to determine, applying the relevant state contract law principles." *Jackson v. Rent–A–Center West, Inc.*, 581 F.3d 912, 918–19 (9th Cir.2009), *rev'd on other grounds by Rent–A–Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010).

***3** Under the FAA, a party to an arbitration agreement may bring a motion in federal district court to compel arbitration. 9 U.S.C. § 4. A district court may not review the merits of the dispute when determining whether to compel arbitration. *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir.2008). Instead, the FAA limits the district court's role "to determining (1) whether a valid agreement to arbitrate exists and, if it does (2) whether the agreement encompasses the dispute at issue." *Id.* (internal citation and quotation marks omitted); *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir.2000). If a valid arbitration agreement exists, the district court is required to enforce the arbitration agreements according to its terms. *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir.2004). Ambiguities as to the scope of the arbitration provision must be interpreted in favor of arbitration. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995).

III. Discussion

On their face, the Arbitration Agreements apply to Plaintiffs' claims against Hobby Lobby. Neither party disputes that Plaintiffs entered into a contractual relationship with Hobby Lobby upon signing the Arbitration Agreements.[4] Additionally, it is clear that the claims asserted by Plaintiffs fall within the scope of the broad language used to describe the claims covered by the Arbitration Agreements. However, Plaintiffs argue that the Agreements are unenforceable under California law for the following reasons: (1) the Arbitration Agreements are procedurally and substantively unconscionable, and (2) the class waiver is unenforceable under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151–59, and the Norris–LaGuardia Act, 29 U.S.C. §§ 101–14.

A. Unconscionability

Plaintiffs argue that the Court should find the Arbitration Agreements to be unenforceable because they are

unconscionable. (Opp'n 1.) In California, unconscionability has both a procedural and a substantive element. *See Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (2000). The former addresses the manner in which the contract or the disputed clause was presented and negotiated, and focuses on "oppression" or "surprise" due to unequal bargaining power. *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev.*, 55 Cal.4th 223, 246, 145 Cal.Rptr.3d 514, 282 P.3d 1217 (2012); *Armendariz*, 24 Cal.4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669. Substantive unconscionability, on the other hand, "focuses on the terms of the agreement and whether those terms are so one-sided as to *shock the conscience." See Soltani v. Western & Southern Life Ins. Co.*, 258 F.3d 1038, 1043 (9th Cir.2001) (quoting *Kinney v. United Healthcare Servs.*, 70 Cal.App.4th 1322, 1330, 83 Cal.Rptr.2d 348 (1999)) (emphasis in original); *see also Armendariz*, 24 Cal.4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (noting that substantive unsconscionability is present if the contract terms are "overly harsh" or "one-sided"). While both procedural and substantive unconscionability are required to render a contract unenforceable, they need not be present in the same degree. *Armendariz*, 24 Cal.4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669. The more substantively oppressive the terms are, the less evidence of procedural unconscionability is required to find that the contract is unenforceable, and vice versa. *Id.* Whether a contract or provision is unconscionable is a question of law. *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal.App.4th 846, 851, 113 Cal.Rptr.2d 376 (2001). The party challenging the arbitration agreement bears the burden of establishing unconscionability. *Pinnacle Museum Tower Ass'n*, 55 Cal.4th at 247, 145 Cal.Rptr.3d 514, 282 P.3d 1217.

1. Procedural Unconscionability

***4** Plaintiffs assert that the Agreements are procedurally unconscionable on two grounds: (1) they are contracts of adhesion, and (2) they incorporate the AAA and ICC rules without actually attaching them to the Agreements.

a. Contract of Adhesion

First, Plaintiffs argue that the Agreements signed by Plaintiffs are procedurally unconscionable contracts of adhesion because they were imposed on Plaintiffs as a condition of employment. (Opp'n 2–3 .) This is confirmed by the terms of the Agreements, which provide that employees "must have signed and returned to [their] supervisor this Agreement to be eligible for employment and continued employment with Company." (Mumm Decl. Ex. A–C.)

The Court concludes that the context in which Plaintiffs agreed to the terms of the Agreements does in fact establish that the contracts are procedurally unconscionable. "An arbitration agreement that is an essential part of a 'take it or leave it' employment condition, without more, is procedurally unconscionable." *Martinez v. Master Prot. Corp.*, 118 Cal.App.4th 107, 114, 12 Cal.Rptr.3d 663 (2004); *see also Armendariz*, 24 Cal.4th at 115, 99 Cal.Rptr.2d 745, 6 P.3d 669 ("In the case of preemployment arbitration contracts, ... few employees are in a position to refuse a job because of an arbitration requirement."). Notably, many courts have found that the take-it or leave-it employment contract scenario only results in a minimal degree of procedural unconscionability. *See, e.g., Collins v. Diamond Pet Food Processors of California, LLC*, 2013 U.S. Dist. LEXIS 60173, at *11, 2013 WL 1791926 (E.D.Cal. Apr. 26, 2013); *Miguel v. JPMorgan Chase Bank, N.A.*, 2013 U.S. Dist. LEXIS 16865, at * 15, 2013 WL 452418 (C.D.Cal. Feb. 5, 2013); *Saincome v. Truly Nolen of Am., Inc.*, 2011 WL 3420604, at *4–5, 10 (S.D.Cal. Aug.3, 2011); *Dotson v. Amgen, Inc.*, 181 Cal.App.4th 975, 981–82, 104 Cal.Rptr.3d 341 (2010). Therefore, the fact that the Arbitration Agreements were signed by Plaintiffs as a condition of their employment does establish that they are to some degree procedurally unconscionable.

b. Failure to Attach Arbitration Rules

Second, Plaintiffs argue that the Arbitration Agreements are procedurally unconscionable because they indicate that the arbitration shall be governed by the rules of the AAA or the ICC and yet they fail to attach the relevant arbitration rules to the documents signed by Plaintiffs. (Opp'n 3–4.)

Under California law, parties to an agreement can incorporate the terms of another document into the agreement by reference. *Troyk v. Farmers Group, Inc.*, 171 Cal.App.4th 1305, 1331, 90 Cal.Rptr.3d 589 (2009); *Wolschlager v. Fid. Nat. Title Ins. Co.*, 111 Cal.App.4th 784, 790, 4 Cal.Rptr.3d 179 (2003). "For the terms of another document to be incorporated into the document executed by the parties, the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties." *Collins*, 2013 U.S. Dist. LEXIS 60173, at *13, 2013 WL 1791926 (quoting *Shaw v. Regents of Univ. of Cal.*, 58 Cal.App.4th 44, 54, 67 Cal.Rptr.2d 850) (1997)) (internal quotation marks omitted). Here, the terms of the are sufficiently

clear and unambiguous to incorporate these rules into the contract by reference.[5]

***5** In support of their argument, Plaintiffs cite to various California cases that have declined to enforce arbitration agreements in light of their failure attach arbitration rules that were incorporated by reference. However, in at least one of those cases, the incorporated rules themselves were unfair or conflicted with the express terms of the arbitration agreement. *See Harper v. Ultimo,* 113 Cal.App.4th 1402, 1406–07, 7 Cal.Rptr.3d 418 (2003) (noting that the incorporated rules were markedly unfair to the weaker party); *see also Zullo v. Inland Valley Publ'g Co.,* 197 Cal.App.4th 477, 487, 127 Cal.Rptr.3d 461 (2011) (distinguishing *Harper* based upon the fact that the incorporated rules in that case were substantively unconscionable). The other California cases cited by Plaintiffs do conclude that the failure to attach incorporated arbitration rules contributes to a finding of procedural unconscionability. *See, e.g., Samaniego v. Empire Today LLC,* 205 Cal.App.4th 1138, 1146, 140 Cal.Rptr.3d 492 (2012); *Trivedi v. Curexo Tech. Corp.,* 189 Cal.App.4th 387, 393, 116 Cal.Rptr.3d 804 (2010). However, the establishment of a general rule that arbitration rules must be attached to an employment agreement in order to avoid a finding of procedural unconscionability would place arbitration contracts on a different footing than other contracts when it comes to the doctrine of incorporation by reference. This differential treatment of arbitration contracts is explicitly prohibited by the Supreme Court's decision in *Concepcion.* 131 S.Ct. at 1761 ("[W]e have repeatedly referred to the [FAA's] basic objective as assuring that courts treat arbitration agreements like all other contracts.") (internal quotation marks omitted). As such, regardless of these California cases, the Court concludes that the failure to attach the arbitration rules to the Agreements does not render them procedurally unconscionable.[6]

Plaintiffs have therefore made a showing of procedural unconscionability based upon the adhesive nature of the contracts. However, California law requires that Plaintiffs also make a showing of substantive unconscionability in order for the Agreements to be held unenforceable on unconscionability grounds. *See Soltani,* 258 F.3d at 1043; *Armendariz,* 24 Cal.4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669. The Court will now turn to the issue of substantive unconscionability.

2. Substantive Unconscionability

Plaintiffs offer two reasons why the Agreements are substantively unconscionable: (1) the class action waiver is unenforceable under *Gentry v. Superior Court,* 42, Cal.4th 443 (2007), and (2) the Agreements contain an unenforceable waiver of the right to bring collective claims under the Private Attorney General Act ("PAGA"), Cal. Lab.Code § 2699, *et seq.* (Opp'n 4–11.)

a. Unconscionability under *Gentry*

Plaintiffs first argue that the class waiver renders the Arbitration Agreement substantively unconscionable under *Gentry v. Superior Court.* (Opp'n 4–6.) In *Gentry,* the California Supreme Court concluded that class action waivers in employment contracts are unenforceable when the prohibition of classwide relief undermines employees' abilities to vindicate their statutory rights. *Id.* at 450, 99 Cal.Rptr.2d 745, 6 P.3d 669. To determine whether a wavier of class claims is enforceable, *Gentry* provides that courts should consider the following factors: (1) "the modest size of the potential individual recovery," (2) "the potential for retaliation against members of the class," (3) "the fact that absent members of the class may be ill informed about their rights," and (4) "other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration." *Id.* at 463, 99 Cal.Rptr.2d 745, 6 P.3d 669. However, numerous federal courts have concluded that *Gentry* has been overruled by the Supreme Court's decision in *Concepcion. See, e.g .*, *Morvant v. P.F. Chang's China Bistro, Inc.,* 870 F.Supp.2d 831, 840–41 (N.D.Cal.2012); *Velazquez v. Sears, Roebuck and Co.,* 2013 WL 4525581, at *7–8 (S.D.Cal. Aug.26, 2013); *Cunningham v. Leslie's Poolmart, Inc.,* 2013 WL 3233211, at *4–5 (C.D.Cal. June 25, 2013). This Court similarly agrees that *Gentry* does not survive *Concepcion's* broad prohibition of state laws that condition the enforceability of arbitration provisions on the availability of classwide relief. *See Concepcion,* 131 S.Ct. at 1748 ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."). Given that *Gentry* does not survive *Concepcion,* the Court finds that the class waiver does not render the Agreements unenforceable.[7]

3. PAGA Waiver

***6** Plaintiffs also argue that the Agreements are substantively unconscionable because they preclude Plaintiffs from pursuing representative PAGA claims.[8] (Opp'n 6–11.) PAGA is a provision of the California Labor Code that permits plaintiffs to bring representative claims on behalf of other aggrieved employees for an employer's violation of the California Labor Code for the purpose of collecting civil penalties. Cal. Lab.Code §

2699, *et seq.*

The Court rejects the argument that Plaintiffs' PAGA claims are not arbitrable and any suggestion that the waiver of representative PAGA claims renders the Arbitration Agreements unenforceable. Recently, in *Concepcion v. AT & T*, the Supreme Court held that the FAA preempted the California state law rule finding that class action waivers in a consumer arbitration agreement were unconscionable. 131 S.Ct. at 1753. As noted by Plaintiffs, in *Brown v. Ralphs Grocery Co.*, a California court of appeals concluded that the Supreme Court's holding in *Concepcion* does not apply to waivers of representative PAGA actions contained in arbitration agreements because *Concepcion* did not specifically address statutory representative actions meant to enforce labor laws for the benefit of the public. 197 Cal.App.4th 489, 503, 128 Cal.Rptr.3d 854 (2011). A handful of cases within the Central District have adopted the reasoning of *Brown*. *See, e.g.*, *Plows v. Rockwell Collins, Inc.*, 812 F.Supp.2d 1063, 1071 (C.D.Cal.2011); *Cunningham*, 2013 WL 3233211, at *8–11. However, most California district courts addressing the issue have declined to follow the *Brown* approach on the basis that *Concepcion* preempts the California rule rendering PAGA waivers unenforceable. *See, e.g.*, *Parvataneni v. E*Trade Financial Corp.*, 967 F.Supp.2d 1298, 1304–05 (N.D.Cal.2013); *Morvant*, 870 F.Supp.2d at 845–46; *Quevedo v. Macy's, Inc.*, 798 F.Supp.2d 1122, 1140–42 (C.D.Cal.2011); *Grabowski v. Robinson*, 817 F.Supp.2d 1159, 1181 (S.D.Cal.2011); *Miguel*, 2013 U.S. Dist. LEXIS 16865, at *26–28, 2013 WL 452418. In light of the Supreme Court's holding in *Concepcion*, this Court similarly concludes that the waiver of representative PAGA claims in an arbitration agreement does not render the agreement substantively unconscionable because concluding otherwise would undermine the FAA's policy of favoring the arbitration of claims. *Concepcion*, 131 S.Ct. at 1748 (noting that the FAA preempts "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives").

Plaintiffs reject this conclusion, arguing that the recent California Supreme Court decision in *Sonic Calabasas A., Inc. v. Moreno ("Sonic II")*, 57 Cal.4th 1109, 163 Cal.Rptr.3d 269, 311 P.3d 184 (2013), creates a " 'carve-out' for PAGA claims from the requirements of the FAA." (Opp'n 7–11.) In *Sonic II*, the California Supreme Court emphasized that the relevant inquiry in determining whether a state rule is preempted following *Concepcion* is the extent to which the rule "interfere[s] with the fundamental attributes of arbitration." 57 Cal.4th at 1150, 163 Cal.Rptr.3d 269, 311 P.3d 184. The opinion goes on to explain that a hypothetical state law rule designed to "protect small-dollar claimants" by "requiring a defendant to pay a penalty plus attorney fees if a plaintiff with a low-value claim obtains an award through litigation or arbitration greater than the defendant's last settlement offer" would not be preempted because it does not conflict with the objectives of the FAA. *Id.* Plaintiffs argue that PAGA is precisely this kind of statute and, consequently, is not preempted. (Opp'n 9–11.) This Court agrees with *Sonic II* that it may be theoretically possible for a state to enact a penalty scheme that protects small-dollar claimants that survives FAA preemption. However, Plaintiffs have ignored the various ways in which representative PAGA claims do in fact burden the fundamental attributes of arbitration. As noted in *Quevedo*, "[a] claim brought on behalf of others would, like class claims, make for a slower, more costly process." 798 F.Supp.2d at 1142. Additionally, "[d]efendants would run the risk that an erroneous decision on a PAGA claim on behalf of many employees would 'go uncorrected' given the 'absence of multilayered review.' " *Id.* (citing *Concepcion*, 131 S.Ct. at 1752). As such, the Court concludes that a state law rule requiring arbitration agreements to permit collective PAGA actions is preempted as inconsistent with the objectives of the FAA.[9]

***7** Thus, Plaintiffs' PAGA claims are arbitrable on an individual basis, and the Arbitration Agreement's provision barring a PAGA claim on behalf of others is enforceable.[10]

B. Whether the Class Waiver is Enforceable Under the NLRA

Plaintiffs argue that the class action waiver provision in the Arbitration Agreement is unenforceable under both the NLRA's provision protecting concerted employee activities, *see* 29 U.S.C. § 157, and the Norris–LaGuardia Act's provision protecting workers from interference in concerted activities, *see* 29 U.S.C. § 102. (Opp'n 11–15.) The argument is largely based on a decision of the National Labor Relations Board ("NLRB") concluding that an agreement precluding class claims regarding employees' wages, hours, or working conditions violated the NLRA. *See D.R. Horton, Inc. v. NLRB*, 357 N.L.R.B. No. 184 (Jan. 3, 2012), *rev'd in part*, 737 F.3d 344 (5th Cir.2013).

The Court concludes that following the NLRB's reasoning on this issue would conflict with the FAA and the Supreme Court's decision in *Concepcion* strongly favoring enforcement of arbitration agreements and strongly against striking class waiver provisions. *See, e.g.*, *Morvant*, 870 F.Supp.2d at 842 (finding that the "NLRA

is not a bar to enforcement of agreements to arbitrate non-NLRA claims on an individual basis ... because Concepcion articulates a strong federal policy choice in favor of enforcing arbitration agreements and thereupon holds that class waiver provisions should not be stricken or be grounds to render entire agreements unenforceable"); *see also Miguel*, 2013 U.S. Dist. LEXIS 16865, at *23–24, 2013 WL 452418 (noting that "every district court in this circuit to consider [*D.R. Horton*] has declined to follow it"). Plaintiffs have cited no contrary authority, and the Court thus concludes that neither the NLRA nor the related Norris–LaGuardia Act renders the class waiver provision in the Agreement unenforceable.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS** the motion to compel arbitration and **STAYS** the action pending the completion of such arbitration.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2014 WL 2810025

Footnotes

1 Fardig, Wright, and Bolin voluntarily terminated their employment with Hobby Lobby on October 23, 2013, November 16, 2013, and October 23, 2013, respectively. (Mumm Decl. Ex. G–I, Docket No. 11–1.)

2 Fardig, Wright, and Bolin also signed substantially similar arbitration agreements as part of their applications to work for Hobby Lobby. (Mumm Decl. Ex. D–F.)

3 The Agreements do exempt "claims for benefits under unemployment compensation laws or workers' compensation laws" and reserve the rights of the parties to "file claims with federal, state, or municipal government agencies." (*Id.*) These exceptions are inapplicable to the present case.

4 In determining whether a valid arbitration agreement exists, the court "should apply ordinary state-law principles that govern the formation of contracts." *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir.2003). Under California law, a valid contract requires: (1) parties capable of contracting, (2) mutual consent, (3) a lawful object, and (4) sufficient cause or consideration. Cal. Civ.Code § 1550. The parties do not dispute the existence of these required elements.

5 Furthermore, the employment applications signed by Fardig, Wright, and Bolin all indicated that they could request copies of the rules from a Hobby Lobby representative or the human resources department and further listed the websites on which the rules are available. (Mumm Decl. Ex. D–F.) Clearly, Plaintiffs were put on notice regarding where they could obtain a copy of the relevant arbitration rules.

6 The federal courts have reached different conclusions on this issue. Numerous federal courts have held that the incorporation of AAA or JAMS rules into an arbitration agreement does not render the agreement procedurally unconscionable even if the rules themselves are not attached to the agreement. *See, e.g., Morgan v. Xerox*, 2013 U.S. Dist. LEXIS 70094, at *9–11, 2013 WL 2151656 (E.D.Cal. May 16, 2013); *Collins*, 2013 U.S. Dist. LEXIS 60173, at *11–15, 2013 WL 1791926. However, some federal courts have noted that the failure to provide such arbitration rules does add to an agreement's degree of procedural unconscionability. *See, e.g., Raymundo v. ACS State & Local Solutions, Inc.*, 2013 U.S. Dist. LEXIS 70141, at *11, 2013 WL 2153691 (N.D.Cal. May 16, 2013); *Williams v. Am. Speciality Health Group, Inc.*, 2013 WL 1629213, at *2 (S.D.Cal. Apr.16, 2013).

7 In support of their argument, Plaintiffs rely upon the post-*Concepcion* case *Truly Nolen of America v. Superior Court,* in which the California Court of Appeals determined that it was bound as a matter of stare decisis to follow *Gentry* without specific guidance from the California Supreme Court because *Concepcion* did not address the precise issue raised in *Gentry.* 208 Cal.App.4th 487, 507, 145 Cal.Rptr.3d 432 (2012) However, Plaintiffs overlook the fact that the *Truly Nolen* court did in fact conclude *Concepcion* implicitly disapproved of the reasoning employed in *Gentry. Id.* at 505–06, 145 Cal.Rptr.3d 432.

8 At the hearing, Plaintiffs' counsel argued that the language of the Arbitration Agreement does not in fact waive representative PAGA claims. While the Arbitration Agreement does not explicitly waive PAGA claims, the Court concludes that the Agreement's waiver of bringing claims "as part of a class action, collective action, or otherwise jointly with any third party" is sufficiently broad to encompass representative PAGA claims. Indeed, Plaintiffs'

Opposition similarly construed the terms of the Agreement's waiver of class, collective, and joint claims as including representative PAGA claims. (*See* Opp'n 6.)

9 Notably, Plaintiffs have cited no authority in which the *Sonic II* has been analyzed in the context of a PAGA claim.

10 At the hearing, Plaintiffs' counsel argued that the Ninth Circuit's recent decision in *Baumann v. Chase Investment Services Corp.,* 747 F.3d 1117 (9th Cir.2014), precludes this conclusion. In that case, the Ninth Circuit held that representative PAGA actions are not sufficiently similar to Rule 23 class actions to establish federal jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1332(d). *Id.* at 1124. Indeed, there are notable differences between class actions and representative PAGA actions. *See Baumann,* 747 F.3d at 1122–24. However, *Baumann* does not address the burdens that representative PAGA claims impose upon the arbitration process. Consequently, *Baumann* does not alter this Court's conclusion that the arbitration of representative PAGA claims would frustrate the objectives of the FAA in contravention of *Concepcion.*

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52 F.Supp.3d 1070
United States District Court,
E.D. California.

Maribel ORTIZ, on behalf of herself, all others similarly situated, and the general public, Plaintiff,
v.
HOBBY LOBBY STORES, INC., an Oklahoma corporation; and Does 1 through 50 inclusive, Defendants.

No. 2:13–cv–01619.
|
Signed Sept. 30, 2014.
|
Filed Oct. 1, 2014.

Synopsis

Background: Employee brought action against employer, on behalf of herself, all others similarly situated, and the general public, alleging that employer failed to pay her and all other similarly situated individuals for all vested vacation pay, failed to pay at least minimum wages for all hours worked, failed to provide accurate written wage statements, and failed to timely pay them all of the owed final wages following separation of employment. Employer moved to dismiss for failure to state a claim, or, in the alternative, compel arbitration and stay all proceedings.

Holdings: The District Court, Troy L. Nunley, J., held that:

[1] arbitration agreement between the parties was procedurally unconscionable, to a minimal level; but

[2] arbitration agreement was not substantively unconscionable;

[3] employee's class action claims fell within scope of arbitration agreement, and she was required to pursue them in arbitration on an individual basis, if at all; and

[4] arbitration agreement precluded employee from bringing individual claim under California's Private Attorneys General Act (PAGA) in arbitration against employer.

Motion granted.

West Headnotes (32)

[1] **Federal Courts**
Alternative dispute resolution

The federal law of arbitrability under the Federal Arbitration Act governs the allocation of authority between courts and arbitrators. 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[2] **Alternative Dispute Resolution**
Arbitration favored; public policy

There is an emphatic federal policy in favor of arbitral dispute resolution.

Cases that cite this headnote

[3] **Alternative Dispute Resolution**
Construction in favor of arbitration

Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Cases that cite this headnote

[4] **Alternative Dispute Resolution**
Evidence

Because waiver of the right to arbitration is disfavored, any party arguing waiver of arbitration bears a heavy burden of proof.

Cases that cite this headnote

[5] **Alternative Dispute Resolution**
Existence and validity of agreement
Alternative Dispute Resolution
Arbitrability of dispute

Generally, in deciding whether a dispute is subject to an arbitration agreement, the court must determine: (1) whether a valid agreement to arbitrate exists, and (2) if it does, whether the agreement encompasses the dispute at issue.

Cases that cite this headnote

[6] **Alternative Dispute Resolution**
Matters to Be Determined by Court
Alternative Dispute Resolution
Arbitrability of dispute
Alternative Dispute Resolution
Merits of controversy

In deciding whether a dispute is subject to an arbitration agreement, the court's role is limited to determining arbitrability and enforcing agreements to arbitrate, leaving the merits of the claim and any defenses to the arbitrator.

Cases that cite this headnote

[7] **Federal Courts**
Alternative dispute resolution

In determining the existence of an agreement to arbitrate, a district court looks to general state law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration.

Cases that cite this headnote

[8] **Alternative Dispute Resolution**
Validity
Alternative Dispute Resolution
Validity of assent
Alternative Dispute Resolution
Unconscionability

An arbitration agreement may only be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.

Cases that cite this headnote

[9] **Alternative Dispute Resolution**
Validity of assent
Alternative Dispute Resolution
Unconscionability

Courts may not apply traditional contractual defenses like duress and unconscionability, in a broader or more stringent manner to invalidate arbitration agreements and thereby undermine the Federal Arbitration Act's purpose to ensure that private arbitration agreements are enforced according to their terms. 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[10] **Alternative Dispute Resolution**
Discretion
Alternative Dispute Resolution
Dismissal

If a court determines that an arbitration clause is enforceable, it has the discretion to either stay the case pending arbitration, or to dismiss the case if all of the alleged claims are subject to arbitration.

Cases that cite this headnote

[11] **Alternative Dispute Resolution**
Unconscionability

Under California law, an arbitration agreement cannot be invalidated for unconscionability absent a showing of both procedural and substantive unconscionability; the procedural element focuses on oppression or surprise due to unequal bargaining power, and the substantive element focuses on overly harsh or one-sided results.

Cases that cite this headnote

[12] **Alternative Dispute Resolution**
Evidence

Under California law, the party challenging the arbitration agreement bears the burden of establishing unconscionability.

Cases that cite this headnote

[13] **Evidence**
Form and Sufficiency in General

The question of whether the authenticity of a document has been sufficiently proved prima facie to justify its admission in evidence rests in the sound discretion of the trial judge.

1 Cases that cite this headnote

[14] **Alternative Dispute Resolution**
Evidence

Employer provided sufficient evidence to provide proper foundation and authentication of document purporting to be arbitration agreement between it and employee, as required for admission of the document into evidence in employee's action against employer to recover wages, where employer attached the arbitration agreement as an exhibit to its district manager's declaration in support of its motion to dismiss, the declaration was based on district manager's personal knowledge and his review of employee's employment files, district manager was familiar with employer's hiring and orientation process, which involved employer presenting arbitration agreement to prospective employees and obtaining their signature, district manager declared under penalty of perjury that information provided in his declaration was true and correct, and the arbitration agreement had been signed by employee. Fed.Rules Evid.Rule 901(a), 28 U.S.C.A.

1 Cases that cite this headnote

[15] **Contracts**
Unconscionable Contracts
Contracts
Procedural unconscionability
Contracts
Substantive unconscionability

California courts apply a sliding scale analysis in making determinations of unconscionability; the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.

Cases that cite this headnote

[16] **Alternative Dispute Resolution**
Unconscionability

No matter how heavily one side of the scale tips, however, both procedural and substantive unconscionability are required for a court to hold an arbitration agreement unenforceable under California law.

Cases that cite this headnote

[17] **Alternative Dispute Resolution**
Unconscionability

Under California law, arbitration agreement between employee and employer was a contract of adhesion, and, thus, was procedurally unconscionable, but only to minimal level, where it was forced upon employee as essential part of take it or leave it condition of employment, and employee had no opportunity to negotiate its terms.

Cases that cite this headnote

[18] **Alternative Dispute Resolution**
Unconscionability

Under California law, it is procedurally unconscionable to require employees, as a condition of employment, to waive their right to seek redress of grievances in a judicial forum.

Cases that cite this headnote

[19] **Alternative Dispute Resolution**
Unconscionability

Under California law, an arbitration agreement that is an essential part of a take it or leave it employment condition, without more, is procedurally unconscionable.

Cases that cite this headnote

[20] **Alternative Dispute Resolution**
Unconscionability

Under California law, arbitration agreement between employee and employer was presented individually, and, thus, was not procedurally unconscionable on basis that it was allegedly buried in several other documents, where the arbitration agreement was clearly labeled, in bold font, "Mutual Arbitration Agreement," and it was its own two-page document with its own signature lines.

Cases that cite this headnote

[21] **Alternative Dispute Resolution**
Unconscionability

Arbitration agreement between employee and employer was not procedurally unconscionable on ground that it did not explicitly provide an opportunity for judicial review, since the Federal Arbitration Act permitted district courts to vacate, modify, or correct arbitration awards under certain circumstances. 9 U.S.C.A. §§ 10, 11 et seq.

Cases that cite this headnote

[22] **Alternative Dispute Resolution**
Scope and Standards of Review

Under California law, an arbitration agreement does not have to explicitly provide for judicial review for judicial review to be available.

Cases that cite this headnote

[23] **Alternative Dispute Resolution**
Unconscionability

Under California law, arbitration agreement between employee and employer was not procedurally unconscionable on ground that rules of arbitration were not attached to it, where it provided that arbitration was to be conducted pursuant to the "American Arbitration Association's National Rules for Resolution of Employment Disputes or the Institute for Christian Conciliation's Rules of Procedure for Christian Conciliation," and rules of both arbitral forums were easily accessible on the organizations' websites.

Cases that cite this headnote

[24] **Contracts**
Matters annexed or referred to as part of contract

Under California law, parties to an agreement can incorporate the terms of another document into the agreement by reference; however, the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties.

Cases that cite this headnote

[25] **Alternative Dispute Resolution**
Unconscionability

Class action waiver provision in arbitration agreement between employee and employer, prohibiting employee from bringing any claim as part of a class action, collective action, or a joint third party action, did not render arbitration agreement substantively unconscionable under California law, although it allegedly impeded employee's ability to vindicate unwaivable statutory rights; state laws conditioning enforceability of arbitration provisions on availability of classwide relief were prohibited, since they would interfere with fundamental attributes of the Federal Arbitration Act, which was to ensure enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[26] **Alternative Dispute Resolution**
Unconscionability

Arbitration agreement between employee and employer was not substantively unconscionable under California law on ground that it only included employment disputes, where it did not exclude any claims that employer could bring against employee.

1 Cases that cite this headnote

[27] **Alternative Dispute Resolution**
Unconscionability

An arbitration agreement that compels arbitration of the claims employees are most likely to bring against the employer but exempts from arbitration the claims the employer is most likely to bring against its employees is substantively unconscionable under California law.

1 Cases that cite this headnote

[28] **Alternative Dispute Resolution**
Unconscionability

Statute of limitations provision in arbitration agreement between employee and employer, requiring employees to file their claims no later than 10 days after they became aware of the dispute, did not render arbitration agreement substantively unconscionable under California law, where statute of limitations provision only applied if there was no limitations period provided by the applicable statute, and all of employee's claims had a statute of limitations set by statute.

Cases that cite this headnote

[29] **Alternative Dispute Resolution**
Unconscionability

Provision in arbitration agreement between employee and employer that waived employee's

right to pursue a representative claim under California's Private Attorneys General Act (PAGA) did not render arbitration agreement substantively unconscionable under California law, although it allegedly prevented employee from asserting a statutory right; state law providing that PAGA action waivers were unenforceable would interfere with Federal Arbitration Act's objective to ensure arbitration agreements were enforced according to their terms. 9 U.S.C.A. § 1 et seq.; West's Ann.Cal.Labor Code § 2698 et seq.

Cases that cite this headnote

[30] **Alternative Dispute Resolution**
Employment disputes

Employee's class action claims in action against employer to recover wages fell within scope of parties' arbitration agreement, which required parties to arbitrate all employment-related disputes and prohibited employees from bringing any claim as part of a class action, collective action, or a joint third party action, and, thus, employee was required to pursue those claims in arbitration on an individual basis, if at all.

Cases that cite this headnote

[31] **Alternative Dispute Resolution**
Operation and Effect

Arbitration agreement between employee and employer precluded employee from bringing individual claim under California's Private Attorneys General Act (PAGA) in arbitration against employer, where PAGA did not permit a single aggrieved employee to litigate his or her claims, but, rather, required an aggrieved employee to bring a PAGA action "on behalf of himself or herself and other current or former employees," and waiver provision in the arbitration agreement prohibited employee from pursuing a representative PAGA claim in arbitration against employer. West's Ann.Cal.Labor Code § 2699(a).

2 Cases that cite this headnote

[32] **Federal Courts**
Highest court
Federal Courts
Anticipating or predicting state decision

In interpreting state law, federal courts are bound by the pronouncements of the state's highest court; if the particular issue has not been decided, federal courts must predict how the state's highest court would resolve it.

1 Cases that cite this headnote

Attorneys and Law Firms

***1074** Chaim Shaun Setareh, Law Offices of Shaun Setareh, Beverly Hills, CA, ***1075** Heather Davis, Protection Law Group, LLP, El Segundo, CA, for Plaintiff.

Cheryl Denise Orr, Drinker Biddle & Reath LLP, San Francisco, CA, for Defendants.

ORDER

TROY L. NUNLEY, District Judge.

This matter is before the Court pursuant to Defendant Hobby Lobby Stores, Inc.'s ("Defendant") Motion to Dismiss Plaintiff's Complaint or, in the alternative, Compel Arbitration and Stay all Proceedings. (Mot. to Dismiss, ECF No. 6.) Plaintiff Maribel Ortiz ("Plaintiff") has filed an opposition to Defendant's motion. (Pl.'s Opp'n to Def.'s Mot. to Dismiss, ECF No. 14.) The Court has carefully considered the arguments raised in Defendant's Motion and Reply as well as Plaintiff's Opposition. For the reasons set forth below, the Court DISMISSES without prejudice Plaintiff's claims so that

they may be addressed in arbitration, as required by the parties' Mutual Arbitration Agreement ("Arbitration Agreement").

I. BACKGROUND

Plaintiff Ortiz brings this putative class action against her previous employer Defendant Hobby Lobby Stores, Inc., on behalf of herself, all others similarly situated, and the general public. (Compl., ECF No. 1 at ¶ 1.) Plaintiff worked as a retail employee for Defendant from November 2010 to January 2013. (ECF No. 14 at 6.) Plaintiff alleges that Defendant has failed to pay her and all other similarly situated individuals for all vested vacation pay, failed to pay at least minimum wages for all hours worked, failed to provide accurate written wage statements, and failed to timely pay them all of the owed final wages following separation of employment. (ECF No. 1 at ¶ 1.) Based on violations of the Fair Labor Standards Act ("FLSA"), the Labor Code, and the Business and Professions Code, Plaintiff seeks recovery as part of a class action under Rule 23 of the Federal Rules of Civil Procedure. (ECF No. 1.) Additionally, Plaintiff seeks to collect civil penalties as part of a representative action for Defendant's violations of the California Private Attorney General Act ("PAGA"). (ECF No. 1 at ¶ 1.)

Defendant contends that Plaintiff's Complaint fails to state a claim upon which relief can be granted because all of Plaintiff's claims are subject to arbitration under the parties' Arbitration Agreement. (ECF No. 6 at 16–17.) Thus, Defendant moves this Court to dismiss Plaintiff's complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 6 at 16–17.) Alternatively, Defendant requests the Court to issue an order compelling Plaintiff to submit her claims to arbitration on an individual basis as well as requests a stay of all proceedings pending resolution of the arbitration, pursuant to 9 U.S.C. §§ 3, 4 (2006). (ECF No. 6 at 16–17.)

II. STANDARD OF LAW

[1] [2] [3] [4] "[T]he federal law of arbitrability under the Federal Arbitration Act ("FAA") governs the allocation of authority between courts and arbitrators." *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir.2008). There is an "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth*, 473 U.S. 614, 631, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). As such, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 626, 105 S.Ct. 3346 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr.* ***1076** *Corp.*, 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). "Because waiver of the right to arbitration is disfavored, 'any party arguing waiver of arbitration bears a heavy burden of proof.' " *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir.1986) (quoting *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1025 (11th Cir.1982)).

[5] [6] Generally, in deciding whether a dispute is subject to an arbitration agreement, the Court must determine: "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir.2000). As such, the Court's role "is limited to determining arbitrability and enforcing agreements to arbitrate, leaving the merits of the claim and any defenses to the arbitrator." *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 479 (9th Cir.1991).

[7] [8] [9] "In determining the existence of an agreement to arbitrate, the district court looks to 'general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration.' " *Botorff v. Amerco*, No. 2:12–cv–01286, 2012 WL 6628952, at *3 (E.D.Cal. Dec. 19, 2012) (citing *Wagner v. Stratton*, 83 F.3d 1046, 1049 (9th Cir.1996)). An arbitration agreement may only "be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT & T Mobility LLC v. Concepcion*, —– U.S. ——, 131 S.Ct. 1740, 1748, 179 L.Ed.2d 742 (2011) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996)). Therefore, courts may not apply traditional contractual defenses like duress and unconscionability, in a broader or more stringent manner to invalidate arbitration agreements and thereby undermine FAA's purpose to "ensur[e] that private arbitration agreements are enforced according to their terms." *Id.* at 1748 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)).

[10] If a court "... determines that an arbitration clause is enforceable, it has the discretion to either stay the case pending arbitration, or to dismiss the case if all of the alleged claims are subject to arbitration." *Delgadillo v. James McKaone Enters., Inc.*, No. 1:12–cv–1149, 2012 WL 4027019, at *3 (E.D.Cal. Sept. 12, 2012). The plain

language of the FAA provides that the Court should "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement...." 9 U.S.C. § 3. However, "9 U.S.C. § 3 gives a court authority, upon application by one of the parties, to grant a stay pending arbitration, but does not preclude summary judgment when all claims are barred by an arbitration clause. Thus, the provision does not limit the court's authority to grant dismissal in the case." *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir.1988).

III. ANALYSIS

Through its motion, Defendant seeks to dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 6 at 16–17.) Alternatively, Defendant requests the Court to issue an order compelling Plaintiff to submit her claims to arbitration on an individual basis and to stay all proceedings pending resolution of the arbitration, pursuant to 9 U.S.C. §§ 3, 4. (ECF No. 6 at 16–17.)

***1077** Defendant argues that Plaintiff's Complaint should be dismissed because the parties executed an arbitration agreement, thereby agreeing to arbitrate employment-related disputes.[1] (ECF No. 6.) Plaintiff disputes that a valid arbitration agreement exists. (ECF No. 14.) Therefore, as a threshold issue, the Court will address Plaintiff's arguments to determine whether a valid arbitration agreement exists.

A. *Existence of a Valid Arbitration Agreement*

[11] [12] In deciding whether to compel arbitration, the Court must determine: "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir.2000). In making this determination, the Court "should apply ordinary state-law principles that govern the formation of contracts." *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir.2003). Under California law, a valid contract requires: (1) parties capable of contracting; (2) mutual consent; (3) a lawful object; and (4) sufficient cause or consideration. Cal. Civ.Code § 1550. An arbitration agreement cannot be invalidated for unconscionability absent a showing of both procedural and substantive unconscionability. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (2000). The procedural element focuses on oppression or surprise due to unequal bargaining power; the substantive element focuses on overly harsh or one-sided results. *Kilgore v. KeyBank, Nat'l Ass'n*, 673 F.3d 947, 963 (9th Cir.2012) (quoting *Armendariz*, 24 Cal.4th at 89, 99 Cal.Rptr.2d 745, 6 P.3d 669). The party challenging the arbitration agreement bears the burden of establishing unconscionability. *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal.4th 223, 247, 145 Cal.Rptr.3d 514, 282 P.3d 1217 (2012).

Plaintiff argues that Defendant failed to prove the existence of the Arbitration Agreement because Defendant submitted the Arbitration Agreement without any foundation or authentication. (ECF No. 14 at 5–7.) Further, Plaintiff claims that the Arbitration Agreement is unenforceable because it is procedurally and substantively unconscionable under California and Federal law. (ECF No. 14 at 7–24.) The Court finds the Arbitration Agreement enforceable for the following reasons.

1. *Authentication of the Arbitration Agreement*

[13] Plaintiff first argues that Defendant submitted the Arbitration Agreement without any foundation or proper authentication. (ECF No. 14 at 5–7.) "The question of whether the authenticity of a document has been sufficiently proved prima facie to justify its admission in evidence rests in the sound discretion of the trial judge." ***1078** *Arena v. United States*, 226 F.2d 227, 235 (9th Cir.1955). Federal Rule of Evidence 901(a) requires that an item be authenticated or identified "by evidence sufficient to support a finding that the item is what the proponent claims it is." *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1182 (1988).

[14] Defendant attached the Arbitration Agreement as an exhibit to Martin Mumm's Declaration in support of Defendant's Motion to Dismiss. (Decl. of Martin Mumm in Supp. of Def.'s Mot. to Dismiss, ECF No. 9; ECF No. 9–1.) Mr. Mumm is a district manager for Defendant. (ECF No. 9 at 2.) His Declaration is based on his personal knowledge and his review of Plaintiff's employment files. (ECF No. 9 at 2.) As a district manager, Mr. Mumm is familiar with Defendant's hiring and orientation process, which involves the Defendant presenting the Arbitration Agreement to the prospective employees and obtaining their signature. (ECF No. 15 at 3). Mr. Mumm declared under penalty of perjury that the information provided in his Declaration is true and correct. (ECF No. 9 at 2.) Furthermore, the Arbitration Agreement, dated November 11, 2010, has been signed by Plaintiff. (ECF No. 9–1 at

3.)

Based on Mr. Mumm's Declaration and the signed Arbitration Agreement, the Court finds that Defendant provided sufficient evidence to support a finding that the item is what Defendant claims it is—the Arbitration Agreement between Defendant and Plaintiff.

2. *Procedural Unconscionability*

Plaintiff maintains that the Arbitration Agreement is procedurally unconscionable for the following reasons: (1) the Arbitration Agreement was forced upon Plaintiff on a take-it-or-leave-it basis, without permitting Plaintiff any opportunity to negotiate its terms; (2) Defendant failed to show that the Arbitration Agreement was presented individually; (3) the Arbitration Agreement fails to provide an opportunity for judicial review; and (4) the Arbitration Agreement did not attach the rules of arbitration. (ECF No. 14 at 9–12.)

[15] [16] California courts apply a "sliding scale" analysis in making determinations of unconscionability: "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Kilgore*, 673 F.3d at 963 (quoting *Armendariz*, 24 Cal.4th at 89, 99 Cal.Rptr.2d 745, 6 P.3d 669). "No matter how heavily one side of the scale tips, however, *both* procedural and substantive unconscionability are required for a court to hold an arbitration agreement unenforceable." *Id.* (quoting *Armendariz*, 24 Cal.4th at 89, 99 Cal.Rptr.2d 745, 6 P.3d 669). The Court must apply this balancing test to determine if the Arbitration Agreement is unenforceable.

a. Contract of Adhesion

[17] Plaintiff claims the Arbitration Agreement was forced upon Plaintiff on a take-it-or-leave-it basis, without permitting Plaintiff any opportunity to negotiate its terms. (ECF No. 14 at 5, 9–10.) Defendant replies that the mere fact that the Arbitration Agreement was presented as a condition of employment does not establish surprise or oppression that rises to the level of procedural unconscionability. (ECF No. 15 at 5.)

[18] [19] Under California law, "it is procedurally unconscionable to require employees, as a condition of employment, to waive their right to seek redress of grievances in a judicial forum." *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1172 (9th Cir.2003) (citing *Armendariz*, 24 Cal.4th at 114–15, 99 Cal.Rptr.2d 745, 6 P.3d 669). ***1079** The District Court for the Central District of California recently evaluated this Arbitration Agreement for unconscionability. *Fardig v. Hobby Lobby Stores, Inc.*, No. SACV 14–561, 2014 WL 2810025 (C.D.Cal. June 13, 2014). The court concluded, "[A]n arbitration agreement that is an essential part of a 'take it or leave it' employment condition, without more, is procedurally unconscionable." *Id.* at *4 (citing *Martinez v. Master Prot. Corp.*, 118 Cal.App.4th 107, 114, 12 Cal.Rptr.3d 663 (2004)). However, the court noted that adhesion contracts only result in a minimal degree of procedural unconscionability. *Id.*

Based on California law, the Court finds that the Arbitration Agreement is procedurally unconscionable because it is part of an adhesion contract. However, this level of procedural unconscionability is only minimal, so the Court must consider Plaintiff's supplemental arguments to determine if the Arbitration Agreement is unenforceable.

b. Presentation of the Arbitration Agreement

[20] Plaintiff claims that Defendant failed to demonstrate that the Arbitration Agreement was presented individually as opposed to buried in several other documents. (ECF No. 14 at 10–11.) Additionally, Plaintiff claims she does not recall reading or receiving the Arbitration Agreement. (ECF No. 14 at 11.) Defendant replies that even if the Arbitration Agreement was presented along with other documents, it does not establish procedural unconscionability. (ECF No. 15 at 5.)

The Arbitration Agreement at issue here is clearly labeled, in bold font, "Mutual Arbitration Agreement." (ECF No. 9–1.) The Arbitration Agreement is its own two-page document and has its own signature lines. (ECF No. 9–1.) There are no facts showing the document was buried amongst other documents. Distinguishing from the cases that Plaintiff relies on, the Court considers *Kilgore*, where the Ninth Circuit determined that the arbitration provision in that case was "not buried in fine print ..., but was instead in its own section, clearly labeled," so it was not procedurally unconscionable. 673 F.3d at 957. Similarly, this Court finds that the Arbitration Agreement was properly presented.

Moreover, Plaintiff's assertion that she does not recall

receiving the Arbitration Agreement is inconsequential. "When a party signs a document agreeing that he/she has read the arbitration agreement, the burden shifts to them to demonstrate they did not agree to arbitrate." *Jackson v. TIC—The Indus. Co.*, No. 1:13–cv–02088, 2014 WL 1232215, at *5 (E.D.Cal. Mar. 24, 2014) (citing *Reilly v. WM Fin. Servs., Inc.*, 95 Fed.Appx. 851, 852–53 (9th Cir.2004)). Plaintiff has not met her burden in demonstrating she did not agree to arbitrate.

For these reasons, this Court holds that the presentation of the Arbitration Agreement does not render the Arbitration Agreement procedurally unconscionable.

c. No Opportunity for Judicial Review

[21] Plaintiff claims that the Arbitration Agreement is procedurally unconscionable because it does not provide an opportunity for judicial review. (ECF No. 14 at 11.) The Arbitration Agreement provides, "The parties agree that the decision of the arbitrator shall be final and binding." (ECF No. 9–1 at 2.)

[22] "[A]n arbitration agreement does not have to explicitly provide for judicial review for judicial review to be available." *Hwang v. J.P. Morgan Chase Bank, N.A.*, No. CV 11–10782, 2012 WL 3862338, at *3 (C.D.Cal. Aug. 16, 2012) (citing ***1080** *Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064, 1075 n. 1, 130 Cal.Rptr.2d 892, 63 P.3d 979 (2003)). "The FAA permits district courts to vacate, modify, or correct arbitration awards under certain circumstances." *Appelbaum v. AutoNation Inc.*, No. SACV 13–01927, 2014 WL 1396585, at *9 (C.D.Cal. Apr. 8, 2014) (citing 9 U.S.C. §§ 10, 11).

Accordingly, the Court finds that the Arbitration Agreement's lack of an express provision permitting judicial review does not establish procedural unconscionability.

d. Failure to Attach Arbitration Rules

[23] Plaintiff claims the rules of arbitration were not attached to the Arbitration Agreement and this renders the Arbitration Agreement procedurally unconscionable. (ECF No. 14 at 11–12.) Defendant replies that as a matter of California contract law, parties are free to incorporate arbitration rules by reference so long as the rules are clearly identified and accessible. (ECF No. 15 at 6.) Defendant is correct.

[24] "Under California law, parties to an agreement can incorporate the terms of another document into the agreement by reference." *Fardig*, 2014 WL 2810025, at *4 (citing *Troyk v. Farmers Grp., Inc.*, 171 Cal.App.4th 1305, 1331, 90 Cal.Rptr.3d 589 (2009); *Wolschlager v. Fid. Nat'l Title Ins. Co.*, 111 Cal.App.4th 784, 790, 4 Cal.Rptr.3d 179 (2003)). However, "the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties." *Collins v. Diamond Pet Food Processors of Cal., LLC*, No. 2:13–cv–00113, 2013 WL 1791926, at *5 (E.D.Cal. April 26, 2013) (quoting *Shaw v. Regents of Univ. of Cal.*, 58 Cal.App.4th 44, 54, 67 Cal.Rptr.2d 850 (1997) (internal quotation marks omitted)).

The Arbitration Agreement provides, "arbitration shall be conducted pursuant to the American Arbitration Association's National Rules for Resolution of Employment Disputes or the Institute for Christian Conciliation's Rules of Procedure for Christian Conciliation...." (ECF No. 9–1 at 2.) As correctly noted by Defendant, the rules of both arbitral forums are easily accessible on the organizations' websites.[2] (ECF No. 15 at 6 n. 4.)

Based on the Arbitration Agreement's clear and unambiguous incorporation of the arbitration rules and the accessibility of those rules, the Court concludes that the failure to attach the rules does not render the Arbitration Agreement procedurally unconscionable.

3. *Substantive Unconscionability*

Plaintiff maintains that the Arbitration Agreement is substantively unconscionable because it: (1) is unconscionable under *Armendariz* and *Gentry;* (2) includes only employment-related disputes and exempts all other disputes that are commonly brought by employers; (3) denies Plaintiff the right to file suit within the applicable statute of limitations; (4) prohibits agreements affecting concerted activity by workers; and (5) contains a waiver provision that "bars Plaintiff from proceeding on a representative, collective or classwide basis." (ECF No. 14 at 9–12.)

a. Substantive Unconscionability under *Gentry*[3]

[25] Relying primarily on ***1081** *Gentry v. Superior Court*,

42 Cal.4th 443, 64 Cal.Rptr.3d 773, 165 P.3d 556 (2007), Plaintiff claims that the Arbitration Agreement's class waiver provision is unenforceable because it impedes employees' ability to vindicate unwaivable statutory rights. (ECF No. 14 at 8.) In relevant part, the Arbitration Agreement class waiver provision prohibits employees from bringing any claim as part of a class action, collective action, or a joint third party action.[4] (ECF No. 9–1 at 2.)

In *Gentry*, the court found that class action waivers in employment contracts are unenforceable when "the prohibition of classwide relief would undermine the vindication of the employees' unwaivable statutory rights ...." 42 Cal.4th at 450, 64 Cal.Rptr.3d 773, 165 P.3d 556. However, numerous federal courts have found that *Gentry* has been overruled by the United States Supreme Court's decision in *Concepcion*. *Fardig*, 2014 WL 2810025, at *5. (citing *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F.Supp.2d 831, 840–41 (N.D.Cal.2012); *Velazquez v. Sears, Roebuck & Co.*, No. 13–cv–680, 2013 WL 4525581, at *7–8 (S.D.Cal. Aug. 26, 2013); *Cunningham v. Leslie's Poolmart, Inc.*, No. CV 13–2122, 2013 WL 3233211, at *4–5 (C.D.Cal. June 25, 2013)). *Concepcion* prohibits states from establishing laws that condition the enforceability of arbitration provisions on the availability of classwide relief because such rules interfere with the fundamental attributes of the FAA, which "is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT & T Mobility LLC v. Concepcion*, —— U.S. ——, 131 S.Ct. 1740, 1748, 179 L.Ed.2d 742 (2011).

Based on *Concepcion* and the FAA, the Court finds that the class waiver provision does not render the Arbitration Agreement substantively unconscionable.

b. Claims Subject to Arbitration

[26] Plaintiff also claims the Arbitration Agreement is unconscionable because it only includes employment disputes, exempting all other claims commonly brought by employers from arbitration. (ECF No. 14 at 12.) Defendant replies that Plaintiff's argument is flawed. (ECF No. 15 at 7.)

[27] An arbitration agreement that "compels arbitration of the claims employees are most likely to bring against [the employer] but exempts from arbitration the claims [the employer] is most likely to bring against its employees" is substantively unconscionable. *Jackson*, 2014 WL 1232215, at *5 (citing *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 785 (9th Cir.2002) (citations omitted)). For example, in *Ferguson v. Countrywide Credit Indus., Inc.*, the Ninth Circuit found that the arbitration agreement was substantively unconscionable because it excluded claims "for worker's compensation or unemployment compensation benefits, ***1082** injunctive and/or other equitable relief for intellectual property violations, unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information." 298 F.3d 778, 785 (9th Cir.2002). Unlike *Ferguson*, the Arbitration Agreement at hand does not exclude any claims that Defendant may bring against Plaintiff. 298 F.3d 778. Accordingly, Plaintiff's argument does not establish substantive unconscionability.

c. Statute of Limitations

[28] Plaintiff claims the Arbitration Agreement denies employees the right to file suit within the applicable statute of limitations by requiring employees to file their claims "no later than 10 days after [they become] aware of the dispute." (ECF No. 14 at 5, 12–13.) Defendant replies that the statute of limitations provision does not affect Plaintiff's ability to vindicate her statutory rights because the statute of limitations provision only applies in instances where no statute of limitations is been provided by statute. (ECF No. 15 at 8.)

The Arbitration Agreement's statute of limitations provision only applies if there is no limitations period provided by the applicable statute. (ECF No. 9–1 at 2.) All of Plaintiff's claims have a statute of limitations set by statute.[5] Accordingly, the Arbitration Agreement's statute of limitations provision does not affect any of Plaintiff's claims. Therefore, the statute of limitations provision does not render the Arbitration Agreement substantively unconscionable.

d. Agreements Affecting Concerted Activity by Workers

Plaintiff claims that the Arbitration Agreement violates the Norris La Guardia Act ("NLGA") and the National Labor Relations Act ("NLRA") because it contains a class action waiver provision that effectively prohibits workers from exercising their right to engage in concerted activity. (ECF No. 14 at 15–24.) Plaintiff bases her argument primarily on the National Labor Relations Board's ("NLRB") decision in *D.R. Horton, Inc. & Cuda*, 357

NLRB No. 184 (Jan. 3, 2012) ("*Horton I* "), where the NLRB held that the NLRA prohibits contracts that compel employees to waive their right to participate in class proceedings to resolve wage claims. (ECF No. 14 at 15–24.) Defendant replies that the *D.R. Horton* decision cannot be given primacy post-*Concepcion.* (ECF No. 15 at 10–11.)

In *Horton I,* the NLRB held that an agreement compelling employees to waive their right to engage in concerted activity was an unfair labor practice, and concluded that the FAA did not preclude this rule ***1083** because the rule is consistent with the FAA's savings clause.[6] 357 NLRB No. 184. The Fifth Circuit Court reviewed and rejected the NLRB's decision in *Horton I,* finding that the NLRB's rule did not fall within the FAA's savings clause. *D.R. Horton, Inc. v. NLRB,* 737 F.3d 344 (5th Cir.2013) ("*Horton II* "). The Court reasoned that the rule favored class proceedings over individual arbitration and therefore interfered with the objectives of the FAA. *Id.* at 355–63. The *Fardig* Court similarly concluded that the NLRB's reasoning in *Horton I* conflicts with the FAA and the Supreme Court's decision in *Concepcion,* which strongly favors the enforcement of arbitration agreements and strongly disfavors striking class waiver provisions. 2014 WL 2810025, at *7 (citing *Morvant v. P.F. Chang's China Bistro, Inc.,* 870 F.Supp.2d 831, 842 (N.D.Cal.2012); *Miguel v. JPMorgan Chase Bank, N.A.,* No. CV 12–3308, 2013 WL 452418, at *9 (C.D.Cal. Feb. 5, 2013)).

Based on federal law, the Court finds that neither the NLGA nor the NLRA render the Arbitration Agreement substantively unconscionable.

e. PAGA Action Waivers

Plaintiff first argues the Arbitration Agreement's waiver provision does not encompass her right to bring a representative PAGA claim. Plaintiff interprets the Arbitration Agreement's waiver provision to bar actions only including more than one named plaintiff, and therefore argues her representative PAGA action does not fall within the scope of the waiver provision. (ECF No. 14 at 13–14.) Defendant replies that the waiver provision includes Plaintiff's representative PAGA claim. (ECF No. 6 at 14–15; ECF No. 15 at 9.) The Court agrees with Defendant and finds that the waiver provision is sufficiently broad to encompass representative PAGA claims. *Fardig,* 2014 WL 2810025, at *6 n. 8 ("[T]he Agreement's waiver of bringing claims 'as part of a class action, collective action, or otherwise jointly with any third party' is sufficiently broad to encompass representative PAGA claims.").[7]

In the alternative, Plaintiff argues that, if the PAGA claim is covered by the Arbitration Agreement, the resulting waiver of her PAGA claim is unconscionable. (ECF No. 14 at 14–15.)

Plaintiff claims that representative PAGA action waivers are substantively unconscionable and therefore unenforceable. (ECF No. 14 at 14–15.) Defendant replies that PAGA action waivers are valid and enforceable. (ECF No. 15 at 9–10.) The California Supreme Court has recently held that such waivers are unenforceable because they violate public policy. Most federal district courts within the state, however, hold that a waiver of PAGA claims is enforceable because the FAA prohibits a conclusion holding otherwise.

***1084** As explained by the United States Supreme Court in *Concepcion,* "a state law rule, however laudable, may not be enforced if it is preempted by the FAA." 131 S.Ct. at 1748. The two primary goals of the FAA are the "enforcement of private agreements" and the "encouragement of efficient and speedy dispute resolution." *Id.* As explained by the Ninth Circuit Court, the Supreme Court has identified two situations where a state law rule is preempted by the FAA. *Kilgore,* 673 F.3d at 957 (citing *Concepcion,* 131 S.Ct. at 1747–48). Under the first situation, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id.* (citing *Concepcion,* 131 S.Ct. at 1747). Under the second situation, "when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration." *Id.* "In that case, a court must determine whether the state law rule 'stand[s] as an obstacle to the accomplishment of the FAA's objectives,' which are principally to 'ensure that private arbitration agreements are enforced according to their terms.' " *Id.* (citing *Concepcion,* 131 S.Ct. at 1748). "If the state law rule is such an obstacle, it is preempted." *Id.*

On June 23, 2014, the California Supreme Court held that an employment agreement containing a PAGA action waiver is unenforceable. *Iskanian v. CLS Transportation Los Angeles, LLC,* 59 Cal.4th 348, 384, 173 Cal.Rptr.3d 289, 327 P.3d 129 (2014) ("Where ... an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law.") The Court reasoned that it is against public policy for an employment agreement to deprive employees of the

option to pursue a PAGA claim before the dispute ever arises. *Id.* at 382–84, 173 Cal.Rptr.3d 289, 327 P.3d 129. The Court explained that a "rule against PAGA waivers does not frustrate the FAA's objectives because ... the FAA aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the state Labor and Workforce Development Agency." *Id.*[8] Despite the holding of the California Supreme Court, federal law is clear that a state is without the right to interpret the appropriate application of the FAA. District courts within the Ninth Circuit have generally held that PAGA claims are subject to Arbitration Agreements and any waiver clauses within those agreements.

There is only one district court that has addressed the California Supreme Court's *Iskanian* decision. Ten days before the California Supreme Court decided *Iskanian*, the Central District Court addressed the Arbitration Agreement at issue in this case and concluded that representative PAGA action waivers are enforceable "because concluding otherwise would undermine the FAA's policy of favoring the arbitration of claims." *Fardig*, 2014 WL 2810025, at *6. After the *Iskanian* court issued its decision on June 23, 2014, the plaintiffs in *Fardig* asked the Central District Court to reconsider its order concluding the Arbitration Agreement was not substantively unconscionable for containing a waiver of the right to bring collective ***1085** claims under PAGA. *Jeremy Fardig, et al. v. Hobby Lobby Stores, Inc.*, No. SACV 14–00561, 2014 WL 4782618 (C.D.Cal. August 11, 2014) (Civil Minutes, Plaintiff's Motion for Reconsideration). The court denied the plaintiffs' motion for reconsideration, explaining that it doubted whether reconsideration was even available under the court's local rules because *Iskanian* only changed persuasive—rather than binding—law. *Id.* at 6 Nonetheless, the court briefly explained that it did not believe it erred in holding that the rule against representative PAGA action waivers was preempted. *Id.* at 6. The court clarified that under *Concepcion*, "any state-law rule standing as an obstacle to the accomplishment of the FAA's objectives of enforcing arbitration agreements according to their terms to allow for efficient procedures tailored to the specific dispute was preempted." *Id.* at 6. Based on this reasoning, the court stated that "allowing the prosecution of representative PAGA claims, where such claims have been waived in an arbitration agreement, would slow the dispute resolution process, in opposition to the FAA's goals." *Id.* at 5. Further, the *Fardig* court explained that even though the *Iskanian* court detailed why its decision is not preempted by the FAA, the California Supreme Court cannot decide this issue. *Id.* at 5.

Consistent with the *Fardig* holding, a majority of District Courts have found representative PAGA action waivers enforceable under the FAA and the United States Supreme Court's ruling in *Concepcion*. *See generally*, *Luchini v. Carmax, Inc.*, No. CV F 12–0417, 2012 WL 2995483, at *14 (E.D.Cal. July 23, 2012) (viewing "PAGA as an obstacle to enforce of arbitration agreements governed by the FAA," and holding that "the arbitration agreement, including its class waiver, must be enforced according to its terms, despite the attributes of PAGA");[9] *Parvataneni v. E*Trade Fin. Corp.*, 967 F.Supp.2d 1298, 1305 (N.D.Cal.2013) (holding that "in the wake of *Concepcion*, ... an arbitration agreement that denies a plaintiff the right to pursue a representative PAGA claim is still a valid agreement"); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F.Supp.2d 831, 846 (N.D.Cal.2012) (using the court's reasoning in *Kilgore* to hold that "[T]he Court must enforce the parties' Arbitration Agreement even if this might prevent Plaintiffs from acting as private attorneys general"); ***1086** *Quevedo v. Macy's, Inc.*, 798 F.Supp.2d 1122, 1140–42 (C.D.Cal.2011) (holding the PAGA action waiver enforceable and rejecting the plaintiff's argument that "sending the PAGA claim to arbitration would irreparably frustrate the purpose of PAGA and prevent [the plaintiff] from fulfilling the Legislature's mandate that he be deputized as an attorney general ...," because the plaintiff's claim was "plainly arbitrable to the extent that he asserts it only on his own behalf"); *Grabowski v. Robinson*, 817 F.Supp.2d 1159, 1181 (S.D.Cal.2011) (relying on the court's reasoning in *Quevedo* and concluding that Plaintiff's "PAGA claim is arbitrable, and that the arbitration agreement's provision barring him from bringing that claim on behalf of other employees is enforceable"); *Miguel*, 2013 WL 452418, at *9–10 (following the court's reasoning in *Quevedo* and finding the plaintiff could arbitrate his PAGA claim individually); *Velazquez v. Sears, Roebuck & Co.*, No. 13–cv–680, 2013 WL 4525581, at *7 (S.D.Cal. Aug. 26, 2013) ("[P]ursuant to the FAA, the PAGA and class action waivers in the Agreement are enforceable."); *Andrade v. P.F. Chang's China Bistro, Inc.*, No. 12–cv–2724, 2013 WL 5472589, at *11 (S.D.Cal. Aug. 9, 2013) (finding the representative PAGA action waiver to be enforceable because "*Concepcion* cannot be read so narrowly as to distinguish between a waiver of a private individual right to class action and a waiver of a public right to a PAGA claim"); *Valle v. Lowe's HIW, Inc.*, No. 11–1489, 2011 WL 3667441, at *6 (N.D.Cal. Aug. 22, 2011) (sending the plaintiffs' PAGA claims to arbitration and stating that even if the arbitrator finds the plaintiffs representative PAGA claims are barred, the plaintiffs could still bring PAGA claims "on behalf of themselves and the state of California").

Departing from the majority of the district courts, the court in *Cunningham v. Leslie's Poolmart, Inc.* found that an employee cannot waive his right to pursue a representative PAGA claim in an arbitration agreement, and if he does so, the PAGA action waiver is unenforceable. No. CV 13–2122, 2013 WL 3233211, at *8 (C.D.Cal. June 25, 2013) (citing *Arias v. Superior Court*, 46 Cal.4th 969, 95 Cal.Rptr.3d 588, 209 P.3d 923 (2009)). The court relied on the California Appellate Court's decision, *Franco v. Athens Disposal Co., Inc.*, where the court ruled that a contract containing a representative PAGA action waiver was unenforceable as contrary to public policy. *Id.* at *8–10 (citing 171 Cal.App.4th 1277, 90 Cal.Rptr.3d 539 (2d Dist.2009)). The court noted, "If plaintiff is barred from pursuing a representative action under PAGA, he is wholly forbidden from asserting his right to pursue a twenty-five percent portion of the civil penalties recoverable by the government for labor code violations allegedly committed by defendant." *Id.* That result would not be permissible under California law or the FAA. *Id.* According to *Cunningham*, the FAA does not preempt states from creating a rule that prohibits representative PAGA action waivers. *Id.* The court reasoned:

> Under *Concepcion*, the FAA is focused on preserving the procedural integrity of arbitration by preventing states from imposing costly, complex, and time consuming formalities upon the arbitration process. The FAA does not, however, place a categorical limit on a state's power to use private enforcement mechanisms to accomplish public policy goals above and beyond the resolution of individual claims. Consequently, although the FAA preempts state law imposing the presence of certain procedures in the arbitration, the FAA does not preempt state laws ensuring that a plaintiff may assert substantive rights in arbitration.

Id.

[29] This Court recognizes the reasoning in *Cunningham*, and agrees that, unlike ***1087** the FLSA and Rule 23 class actions, which both allow recovery of a statutory right on an individual basis, the waiver of a PAGA action may prevent a plaintiff from asserting a statutory right. However, this Court agrees with the majority of California district courts holding that the FAA's objective is to "ensure arbitration agreements are enforced according to their terms." *AT & T Mobility LLC v. Concepcion*, —— U.S. ——, 131 S.Ct. 1740, 1748, 179 L.Ed.2d 742 (2011). It is clear that the majority of federal district courts find that PAGA action waivers are enforceable because a rule stating otherwise is preempted by the FAA and *Concepcion.* As such, this Court holds that representative PAGA action waivers are enforceable.

Therefore, the Arbitration Agreement is not substantively unconscionable for containing a representative PAGA action waiver.

B. *Whether the Arbitration Agreement Encompasses the Disputed Issues*

Because the Court has found that the Arbitration Agreement is valid and enforceable, the Court must determine "whether the agreement encompasses the dispute[s] at issue." *Chiron*, 207 F.3d at 1130. In relevant part, the Arbitration Agreement requires Defendant and Plaintiff to arbitrate all employment-related disputes. Additionally, the Arbitration Agreement prohibits employees from bringing any claim as part of a class action, collective action, or a joint third party action. (ECF No. 9–1 at 2.)[10]

Plaintiff brings six employment-related disputes as part of a class action and one employment-related dispute as part of a representative action. (ECF No. 1.) Consequently, all of Plaintiff's claims fall within the scope of the Arbitration Agreement. Notably, Plaintiff's claims also fall within the scope of the Arbitration Agreement's waiver provision and therefore Plaintiff may be prohibited from bringing those claims in court or in arbitration. As such, the Court will address whether Plaintiff can proceed with her claims in arbitration pursuant to the Arbitration Agreement.

1. *Class Action Claims*

[30] The Arbitration Agreement's waiver provision prohibits Plaintiff from proceeding on a class basis. As discussed above, arbitration agreements containing class action waivers are valid and enforceable. *See generally Concepcion*, 131 S.Ct. 1740. Therefore, Plaintiff must pursue her claims in arbitration on an individual basis, if

at all. The FLSA permits Plaintiff to bring her first cause of action as an individual action. The Labor Code permits Plaintiff to bring her second, third, fourth, and fifth causes of actions as individual actions. The Business and Professions Code permits Plaintiff to bring her sixth cause of action as an individual action. Therefore, Plaintiff must pursue her first six causes of action in arbitration on ***1088** an individual basis, if at all. She has waived her right to bring class action claims.

2. *Representative PAGA Claim*

[31] The Arbitration Agreement's waiver provision prohibits Plaintiff from pursuing her representative PAGA claim in arbitration. *See* Section II.A.3.e., *supra.* Accordingly, the Court must determine whether Plaintiff can bring her PAGA action in arbitration on an individual basis. California courts indicate that PAGA claims may not be brought on an individual basis. California federal district courts disagree on the issue.

[32] "In interpreting state law, federal courts are bound by the pronouncements of the state's highest court. If the particular issue has not been decided, federal courts must predict how the state's highest court would resolve it." *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1203 (9th Cir.2002) (internal citations omitted). Although the California Supreme Court has not directly addressed this issue, state courts have generally held that PAGA actions cannot be brought on an individual basis. The California Supreme Court explained, "In a 'representative action,' the plaintiff seeks recovery on behalf of other persons. There are two forms of representative actions: those that are brought as class actions and those that are not." *Arias v. Superior Court*, 46 Cal.4th 969, 977 n. 2, 95 Cal.Rptr.3d 588, 209 P.3d 923 (2009). Relying on *Arias*, a California Court of Appeal clarified that a PAGA claim is not an individual claim because "[a] plaintiff asserting a PAGA claim may not bring the claim simply on his or her own behalf but must bring it as a representative action and include 'other current or former employees.' " *Reyes v. Macy's, Inc.*, 202 Cal.App.4th 1119, 1123, 135 Cal.Rptr.3d 832 (1st Dist.2011). Therefore, the court explained, "The PAGA statute does not enable a single aggrieved employee to litigate his or her claims, but requires an aggrieved employee 'on behalf of herself or himself *and* other current or former employees' to enforce violations of the Labor Code by their employers." *Id.* at 1123–24, 135 Cal.Rptr.3d 832 (emphasis in original).

In *Iskanian*, its most recent decision regarding PAGA, the California Supreme Court does not explicitly state whether PAGA claims may exist on an individual basis. However, the Court indicated that only representative PAGA actions fulfill the purpose of the statute. 59 Cal.4th at 384, 173 Cal.Rptr.3d 289, 327 P.3d 129. The Court held, "whether or not an individual claim is permissible under the PAGA ... [t]hat plaintiff and other employees might be able to bring individual claims for Labor Code violations in separate arbitrations does not serve the purpose of the PAGA." *Id.* Because the California Supreme Court finds that individual PAGA actions are not consistent with the state's statutory intent, this Court considers this case to be consistent with previous rulings on this issue.

Under federal law, there is a split of opinion as to whether a PAGA action can be brought on an individual basis. Some district courts have permitted employees to pursue PAGA actions in arbitration on an individual basis. *See Fardig*, 2014 WL 2810025, at *7 ("Plaintiffs' PAGA claims are arbitrable on an individual basis, and the Arbitration Agreement's provision barring a PAGA claim on behalf of others is enforceable."); *Miguel*, 2013 WL 452418, at *9–10 (holding that the plaintiff could arbitrate his PAGA claim individually based on the court's reasoning in *Quevedo*); *Quevedo*, 798 F.Supp.2d at 1140–42 (finding the representative PAGA waiver to be enforceable, but permitting plaintiff ***1089** to arbitrate the PAGA claim to the extent the plaintiff asserted it on his own behalf); *Grabowski*, 817 F.Supp.2d at 1181 ("[T]he Court concludes that ... [Plaintiff's] PAGA claim is arbitrable, and that the arbitration agreement's provision barring him from bringing that claim on behalf of other employees is enforceable.").

Other district courts, however, have found that PAGA actions cannot be brought on an individual basis. *See Luchini*, 2012 WL 2995483, at *16 ("Dismiss[ing] without prejudice the [plaintiff's] class, collective and PAGA claims in that such claims are not subject to arbitration with [the plaintiff's] individual claims."); *Machado v. M.A.T. & Sons Landscape, Inc.*, No. 2:09–cv–00459, 2009 WL 2230788, at *2–4 (E.D.Cal. July 23, 2009) (stating that a PAGA action cannot be brought as an individual action—it may only be brought as a representative action); *Cunningham*, 2013 WL 3233211, at *8 (clarifying that PAGA requires that actions must be brought on a representative capacity because "PAGA does not recognize the existence of an individual claim").

This Court finds that PAGA actions cannot exist on an individual basis. The plain language of the statute permitting PAGA actions states that a plaintiff must bring such an action "on behalf of himself or herself *and* other

current or former employees." Cal. Labor Code § 2699(a) (emphasis added). This interpretation is supported by California courts. Therefore, the Court finds that Plaintiff's PAGA action falls within the waiver provision and Plaintiff is barred from pursuing her PAGA action in arbitration.

C. *Motion to Dismiss, or in the Alternative, Compel Arbitration and Stay the Proceedings*

Having concluded that a valid arbitration agreement exists and that the disputes are encompassed within the scope of the agreement, the Court must dismiss the action or compel the action to arbitration and stay the proceedings. A district court "has the discretion to either stay the case pending arbitration or to dismiss the case if all of the alleged claims are subject to arbitration." *Delgadillo v. James McKaone Enters., Inc.*, No. 1:12–cv–1149, 2012 WL 4027019, at *3 (E.D.Cal. Sept. 12, 2012.) The Court concludes that all of Plaintiff's claims are subject to arbitration, and therefore dismisses Plaintiff's claims without prejudice.

IV. CONCLUSION

For the foregoing reasons, the Court DISMISSES Plaintiff's claims without prejudice so that they can be addressed in arbitration.

IT IS SO ORDERED.

All Citations

52 F.Supp.3d 1070, 2014 Wage & Hour Cas.2d (BNA) 169,329

Footnotes

1 The Arbitration Agreement provides:

> *Employee and Company hereby agree that any dispute, demand,* claim, controversy, cause of action, or suit (collectively referred to as 'Dispute') that Employee may have ... with or against Company ... *that in any way arises out of, involves, or relates to Employee's employment with Company ... shall be submitted to and settled by final and binding arbitration in the county and state in which Employee is or was employed....* This Agreement between Employee and Company to arbitrate all *employment-related Disputes includes,* but is not limited to, *all Disputes under or involving ... the Fair Labor Standards Act ... and all other* federal, *state,* and municipal *statutes, regulations, codes,* ordinances, common laws, or public policies *that regulate,* govern, cover, or relate to ... *wages, compensation, work hours, ... and any other employment-related Dispute in tort or contract."*

(ECF No. 9–1 at 2.) (emphasis added).

2 *See* American Arbitration Association, *Employment Arbitration Rules and Mediation Procedures–English* (Nov. 1, 2009), https://www.adr. org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased; The Institute for Christian Conciliation, *Rules of Procedure,* http://www. peacemaker.net/site/c.nuIWL7MOJtE/b.5335917/k.D8A2/Rules_of_Procedure.htm.

3 Plaintiff only cites to *Armendariz* for a statement of law. (ECF No. 14 at 8.) As such, the Court focuses its analysis on Plaintiff's argument under *Gentry.*

4 Specifically, the Arbitration Agreement provides:

> The parties agree that *all Disputes* contemplated in this Agreement *shall be arbitrated with Employee and Company as the only parties to the arbitration, and that no Dispute* contemplated in this Agreement *shall be arbitrated, or litigated in a court of law, as part of a class action, collective action, or otherwise jointly with any third party.*

(ECF No. 9–1 at 2.) (emphasis added).

5 Plaintiff's first cause of action is an FLSA claim for Defendant's failure to pay employees for all hours worked in violation of the FLSA. (ECF No. 1 at 6–7.) Pursuant to Section 255 of the United States Code, there is a two-year statute of limitations for Plaintiff's FLSA claim. Plaintiff's second, third, fourth, and fifth causes of action are Labor Code claims for Defendant's failure to pay hourly and overtime wages, failure to provide accurate written wage statements, failure to timely pay all final wages, and failure to indemnify. (ECF No. 1 at 7–15.) Pursuant to Section 338 of the California Code of Civil Procedure, there is a three-year statute of limitations for Plaintiff's Labor Code claims. Plaintiff's sixth cause of action is a Business and Professional Code claim for unfair competition. (ECF No. 1 at 15–18.) Pursuant

to Section 17208 of the California Business and Professions Code, there is a four-year statute of limitations for Plaintiff's unfair competition claim. Plaintiff's seventh, and final, cause of action is a representative PAGA claim to recover civil penalties from Defendant for violating the Labor Code. (ECF No. 1 at 18–21.) Pursuant to Section 340 of the California Code of Civil Procedure, there is a one-year statute of limitations for Plaintiff's PAGA claim.

6 The savings clause provides that arbitration agreements are to be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

7 The California legislature enacted PAGA to allow a form of qui tam action " 'in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts.' " *Baumann v. Chase Inv. Servs. Corp.,* 747 F.3d 1117, 1121 (9th Cir.2014) (citing *Arias v. Superior Court,* 46 Cal.4th 969, 95 Cal.Rptr.3d 588, 209 P.3d 923 (2009)). If successful, "[t]he LWDA receives seventy-five percent of the penalties collected in a PAGA action, and the aggrieved employees the remaining twenty-five percent." *Id.* at 1121 (citing Labor Code § 2699(a)).

8 "[A] PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the state, which alleges directly or through its agents—either the Labor and Workforce Development Agency or aggrieved employees—that the employer have violated the Labor Code."*Id.* at 386–87, 173 Cal.Rptr.3d 289, 327 P.3d 129.

9 In *Luchini,* the arbitration agreement prohibited the arbitrator from hearing class, collective, or representative actions. *Luchini v. Carmax, Inc.,* No. CV F 12–0417, 2012 WL 2995483, at *3 (E.D.Cal. July 23, 2012). The defendant argued that "courts must enforce arbitration agreements 'according to their terms' " while the plaintiff argued that his "inability to bring a PAGA claim in a representative action equates to 'his inability to bring a PAGA claim at all.' " *Id.* at *13–14. In making this argument, the plaintiff relied on *Brown v. Ralphs Grocery Co.,* 197 Cal.App.4th 489, 502–503, 128 Cal.Rptr.3d 854 (2d Dist.2011). The *Brown* court stated, "a single-claimant arbitration under the PAGA for individual penalties will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code .... That plaintiff and other employees might be able to bring individual claims for Labor Code violations in separate arbitrations does not serve the purpose of the PAGA ..." *Id.* at *14 (citing *Brown,* 197 Cal.App.4th at 502, 128 Cal.Rptr.3d 854). The court in *Luchini* found that while the *Brown* rationale was reasonable, federal courts have taken a different view because "*Brown* fails to reconcile the U.S. Supreme Court's directives that the FAA displaces outright state law prohibition of 'arbitration of a particular type of claim' and that a state is unable to require a procedure inconsistent with the FAA, 'even if it is desirable for unrelated reasons.' " *Id.* (citing *Concepcion,* 131 S.Ct. at 1753). Due to this, the court compelled the plaintiff's individual claims to arbitration, and dismissed without prejudice the plaintiff's PAGA claims. *Id.* at *16.

10 The Arbitration Agreement provides:

> Employee and Company hereby agree that any dispute, demand, claim, controversy, cause of action, or suit (collectively referred to as 'Dispute') that Employee may have ... with or against Company ... *that in any way arises out of, involves, or relates to Employee's employment with Company ... shall be submitted to and settled by final and binding arbitration in the county and state in which Employee is or was employed* .... This Agreement between Employee and Company to arbitrate all *employment-related Disputes includes,* but is not limited to, *all Disputes under or involving ... the Fair Labor Standards Act ... and all other* federal, *state,* and municipal *statutes, regulations, codes,* ordinances, common laws, or public policies *that regulate,* govern, cover, or relate to ... *wages, compensation, work hours, ... and any other employment-related Dispute in tort or contract."*

(ECF No. 9–1 at 2.) (emphasis added).

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CERTIFICATE OF SERVICE

I certify that on this 20th day of December, 2016, I caused the JOINT APPENDIX VOLUME 2 OF HOBBY LOBBY STORES, INC. AND COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users properly addressed:

Ms. Valerie L. Collins, Attorney

Ms. Linda Dreeben, Attorney

Joseph F. Frankl, Attorney

Ms. Elizabeth A. Heaney, Attorney

Yasmin Macariola, Attorney

David A. Rosenfeld, Attorney

s/ Ron Chapman, Jr.
Ron Chapman, Jr.

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